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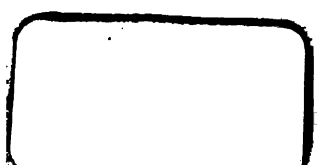




















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THE  
**ONTARIO LAW REPORTS.**

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**CASES DETERMINED IN THE COURT OF APPEAL  
AND IN THE HIGH COURT OF JUSTICE  
FOR ONTARIO.**

**1912.**

**REPORTED UNDER THE AUTHORITY OF THE  
LAW SOCIETY OF UPPER CANADA**

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**VOL. XXV.**

**EDITOR:  
EDWARD B. BROWN, K.C.**

**TORONTO :  
CANADA LAW BOOK COMPANY, LIMITED,  
LAW BOOK PUBLISHERS,  
22-24 TORONTO ST.**

**1912**

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**JUDGES**  
**OF THE**  
**COURT OF APPEAL**  
**DURING THE PERIOD OF THESE REPORTS.**

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## MEMORANDA.

On the 17th April, 1912, HAUGHTON LENNOX, one of His Majesty's Counsel, was appointed a Judge of the Supreme Court of Judicature for Ontario, and a Justice of the High Court of Justice for Ontario (not attached to any Division of the High Court).

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### CALL TO THE BAR.

In Hilary Term, 1912, the following gentlemen were called to the Bar:—

JOSEPH HENRY WALKER.  
ROBERT PICKARD MCBRIDE.  
THOMAS REGINALD SLOAN.  
ABRAHAM SINGER.

In Easter Term, 1912, the following gentlemen were called to the Bar:—

ARTHUR CAMPBELL CRAIG (with honours and medal).  
FREDRIC CHARTERIS CARTER (with honours and medal).  
ALFRED ERNEST DAY (with honours).  
ALEXANDER ÆNEAS McDONALD.  
FRANK GORDON MACKENZIE.  
WILLIAM HUMPHREY CLIPSHAM.  
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MOORE ARMSTRONG MILLER.  
JEAN JUSTIN BERNADIN BOUTET.

### **ERRATA.**

**Page 142, lines 15 and 16, " 8 M. & W." should be "13 M. & W."**

**Page 394, line 7, "8 O.L.R. 94" should be "8 O.L.R. 84."**

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# REPORTS OF CASES

DETERMINED IN THE

## COURT OF APPEAL

AND IN THE

## HIGH COURT OF JUSTICE FOR ONTARIO.

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[BOYD, C.]

McALLISTER v. McMILLAN.

1911

Nov. 3.

*Costs—Unsuccessful Action to Set aside Will—Incidence of Costs.*

Where probate of a will was granted without opposition, and this action was afterwards brought to vacate the probate and nullify the will, for alleged undue influence and testamentary incapacity, on insufficient evidence and without any proper inquiry, the plaintiff was ordered to pay all the costs of the defendants who actively defended.

Rules as to ordering payment of costs out of the estate and relieving unsuccessful litigants of the payment of costs, in causes testamentary.

ACTION to vacate the letters probate of a will and to set aside the will on the grounds of undue influence and testamentary incapacity.

November 1. The action was tried at Owen Sound, before BOYD, C., without a jury.

W. H. Wright, for the plaintiff.

W. S. Middlebro, K.C., for the defendants.

The action was dismissed at the trial, the question of costs being reserved.

November 3. BOYD, C.:—The incidence of costs I reserved for consideration.

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The will was attacked on two grounds: of undue influence and of testamentary incapacity. The former was abandoned at the opening, and at the close of the hearing the latter failed on the facts.

The testatrix was a childless widow, aged seventy, who lived at Owen Sound, with her niece, the chief beneficiary, and her sister, also a beneficiary. The chief cause of her death was pneumonia, which developed rapidly from the first appearance about midnight (Friday or Saturday), ending in her death at five p.m. on the next day, Sunday. She was minded to make a will on Friday night, and spoke of going to her lawyer on Monday for that purpose. But the progress of the disease led to the calling in of a solicitor early on Sunday morning. He asked her how she wished to deal with her property, and she told him, in directions which he briefly noted at the time. Then he went for breakfast, and also to get a blank form of will, with which he returned in about an hour and filled up at her house, in accordance with the previous instructions. The will was read over clause by clause and her assent given, and she affixed her signature with a firm hand. This dealing was closed about ten o'clock in the morning. Just before this, between nine and ten, another doctor had been called in to diagnose the case, by the attending physician—who had been the family doctor for seventeen years, and was an intimate friend of the testatrix. The other was not asked to examine with a view to testing the state of the patient's capacity for the disposal of her affairs, but confined himself to her physical condition. He does not agree in opinion with Dr. Brown, who was in charge, as to the character of the pneumonia; he found her in a state of unconsciousness, if not of stupor, and, while able to respond to suggestions, she was not, in his opinion, capable of initiative as to the disposing of her property.

I thought it unfortunate that his attention had not been called to the testamentary operation then in process of completion, and his judgment obtained as to her capacity, having regard to what had occurred that morning. Doubtless, the condition in which the patient was found between giving the instructions and the execution of the will was due to some exhaustion occasioned by the effort to make known her wishes, which she had

thought out before; but she was quite able to rouse herself or be roused to attend to the final act of signature, after the consulting doctor had departed. The facts that the beneficiaries had not in any manner intervened to shape the provisions of the will, and that the family physician was fully satisfied that the testatrix knew what she was doing, and intended to do as she did with her property, may serve to explain why the opinion of the other medical man was not sought as to her capacity to make a will. There was no justification for imputing undue influence in the obtaining of this will; there was some justification for alleging insufficient capacity, in view of the opinion of the doctor called in contemporaneously with the completion of the will. But, upon the evidence taken, I had and have no doubt that the will is in every respect a valid instrument.

The whole amount of the estate is under \$6,000. So far as the costs arose from alleging undue influence, the plaintiff should pay them. As to the rest of the costs, the question is, should the plaintiff be relieved from their payment? For I cannot agree that these costs of litigation should be borne by the estate. The common law rule is, that the loser is to pay the costs; the equity rule is, that costs are in the inherent power of the Court to deal with *arbitrio boni viri*: Lord Chancellor Hardwicke in *Corporation of Burford v. Lenthall* (1743), 2 Atk. 551, 552.

In testamentary and in other cases these rules may be blended, with this result that costs may properly be ordered to follow the result unless good reason appears to disturb this direction. In causes testamentary two general grounds of deviation are: (1) that, if the conduct of the testator or that of the principal beneficiaries has been really the cause of contention, it may be expedient to impose all costs upon the estate, even if the will is supported; or (2), if the surrounding conditions are such as to justify, reasonably, an investigation into the matter, then the party who unsuccessfully litigates may rightly be relieved from the payment of costs.

The circumstances of this case bring it within the latter line of inquiry; was the plaintiff justified in claiming judicial investigation into the making of the will? Justification may arise if the complainant has taken proper steps, by inquiry and other-

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wise, to inform himself of the facts of the case, so as to be able to reach a *bonâ fide* belief in the existence of a state of things which, if it did exist, would warrant the interposition of the Court. But if, without sufficient or reasonable inquiry, without having exhausted obvious means of information by applying to the executors or the attesting witnesses (who were in this case the physician and the solicitor who drew the will), without having more than some suspicion as to capacity, which proper preliminary inquiries should or would have dissipated—an attack is made, the complainant cannot expect to unload the expense he incurs on the estate or any party other than himself. This plaintiff had no expectation of any benefit from the deceased; he relied apparently on the opinion of the occasional physician, upon what that physician himself recognises as a far from thorough examination; he charges undue influence rashly, and makes but a futile attempt to prove a lack of sufficient capacity, by the examination of experts whose conclusions fail to take into account the well-proved and the real facts of the transaction. He does not appear to have been misled or misinformed as to anything regarding the giving of instructions and the execution of the will, or by any one who had any knowledge of what was being done, but simply asks the Court to clear up the suspicions which induced him to doubt whether the will was or was not valid.

Now, it is a well-known practice in probatory matters that the next of kin can always call for proof of a will *per testes*, and cross-examine the witnesses called in support of that will, without being subject to the payment of costs. Here, however, probate was granted without opposition; and, thereafter, this action is launched to vacate the probate and nullify the will, on insufficient evidence and without any proper inquiry. I see no reason to relieve the plaintiff from the payment of all the costs of the defendants who actively defended; and such will be the judgment of the Court, dismissing the action with costs.

The last English decision on this subject is, I think, *Spicers v. English*, [1907] P. 122; and I also refer to an elaborate gathering of the more important cases in the judgment of Chief Justice Way in *Ponder v. Burmeister*, [1909] S. Austr. L.R. 62, 99. See also *Robertson v. McOuet* (1910), 17 O.W.R. 852.



[TEETZEL, J.]

RE GRAHAM.

1911

Nov. 4.

*Surrogate Courts—Jurisdiction—Surrogate Courts Act, 10 Edw. VII. ch. 31, sec. 69—"Claim or Demand"—Claim to Establish Donatio Mortis Causa—Amount of Money Involved—1 Geo. V. ch. 18—Judge Adjudicating by Consent—Private Tribunal—Quasi-Arbitrator—Appeal from Award—Forum—Arbitration Act—Finding of Arbitrator—Credibility and Demeanour of Witnesses—Refusal to Interfere.*

Section 69 of the Surrogate Courts Act, 10 Edw. VII. ch. 31, does not confer power on the Judge of a Surrogate Court to adjudicate upon a claim to moneys of a deceased person under an alleged *donatio mortis causa*: the "claim or demand" referred to in sub-sec. 1 is a claim or demand against the estate by a "creditor."

Where the Judge of a Surrogate Court, by consent of the claimant and of the administrators of the estate of an intestate, heard evidence and adjudicated upon a claim of a person seeking to establish a *donatio mortis causa* in respect of moneys deposited in a savings bank to the credit of the intestate:—

*Held*, that the Judge had no jurisdiction as such, both because sec. 69 did not apply to such a claim, and because the amount involved was more than \$800 (1 Geo. V. ch. 18); and the consent could not confer jurisdiction upon the Judge to adjudicate as such; but his decision should be regarded as that of a quasi-arbitrator or private tribunal constituted by the parties; and, a right of appeal having been reserved by the consent under which he acted, an appeal lay from his decision, as from an award, to a Judge of the High Court, under the Arbitration Act, 9 Edw. VII. ch. 35.

*Semble*, that, if there had been jurisdiction under sec. 69 of the Surrogate Courts Act, there would have been a right of appeal from the decision upon the claim to a Judge of the High Court, under 1 Geo. V. ch. 18, sec. 3.

And *held*, upon the merits, that the Court should not reverse the finding of the Judge or arbitrator against the claim; he having discredited, on account of their demeanour in the witness-box, the claimant and her daughter, whose testimony was in conflict with evidence adduced for the administrators, which he believed; and it not appearing from the judgment or the evidence that he had misapprehended the effect of the evidence or failed to consider a material part of it.

*Coghlan v. Cumberland*, [1898] 1 Ch. 704, followed.

*Beal v. Michigan Central R.R. Co.* (1909), 19 O.L.R. 502, distinguished.

AN appeal by Ida May Sewell from an order or judgment of the Judge of the Surrogate Court of the County of York dismissing the appellant's claim to a sum of \$1,161.94, moneys deposited in a bank to the credit of John Graham, deceased. The claim was based upon an alleged *donatio mortis causa*.

October 23. The appeal was heard by TEETZEL, J., in the Weekly Court at Toronto.

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W. N. Ferguson, K.C., for the appellant.

H. T. Kelly, K.C., for the Trusts and Guarantee Company,  
administrators of the estate of John Graham.

November 4. TEETZEL, J.:—The question involved is, whether the claimant is entitled to hold a certain savings bank pass-book and the money represented by it, which in his lifetime belonged to the intestate, as a *donatio mortis causâ*.

When the claim was set up, the administrators assumed that the matter came within the provisions of the Surrogate Courts Act, 10 Edw. VII. ch. 31, sec. 69; sub-sec. 1 of which provides: “(1) Where a claim or demand is made against the estate of a deceased person, which, in the opinion of his personal representative, is unjust, in whole or in part, such personal representative may, at any time before payment, serve the claimant with a notice in writing that he contests the same in whole or in part, and, if in part, stating what part and also referring to this section.”

The administrators, accordingly, gave a notice of contestation, as provided by sub-sec. 1.

The amount involved in the claim was \$1,161.94; and, upon the learned Judge being applied to by the claimant for an appointment to adjudicate, he pointed out that, as the amount exceeded \$500, he could not dispose of the question in dispute, under sec. 69, sub-sec. 5, unless all parties agreed.

Since the argument, counsel have put in the correspondence, consisting of a letter from the claimant's solicitor to the solicitors for the administrators, pointing out the objection raised by the learned Judge, and asking whether they wished to have the matter disposed of by the Judge or to have it tried in a High Court action; to which the solicitors for the administrators replied that they were willing to have the matter disposed of by the learned Judge, “provided of course that all rights of appeal by either party are preserved.”

These terms were accepted; and the learned Judge proceeded to hear the evidence of both parties, and gave judgment in favour of the administrators; whereupon an order was issued, in the Surrogate Court, disallowing the claim and ordering the claimant to pay costs.

Upon the argument, Mr. Kelly objected that the appeal should have been to a Divisional Court, under sec. 34, sub-sec. 1, of the Surrogate Courts Act; but I held that, assuming that the proceedings were properly before the learned Judge under sec. 69, the right of appeal is governed by sub-sec. 6, of sec. 69, as reconstructed by 1 Geo. V. ch. 18, sec. 3, which was in force when the judgment was given, and that the appeal would be to a Judge in Single Court; but, until furnished with the terms of the consent upon which the Judge proceeded, I doubted whether the appeal was competent. The argument, however, proceeded upon the assumption that the learned Judge was authorised by the consent to dispose of the matter, either as a Judge of the Surrogate Court or as a quasi-arbitrator between the parties.

Dealing first with the question of jurisdiction, I am of opinion that sec. 69 does not confer power on the Judge of the Surrogate Court to adjudicate upon a claim of the character of the one in dispute. The "claim or demand" referred to in sub-sec. 1, when that sub-section is read in the light of sub-secs. 4 and 5, is clearly a claim or demand against the estate by a "creditor" for payment of a money demand.

Now the claim of a person seeking to establish a *donatio mortis causâ*, where something has to be done by the executor or administrator to perfect the title, such as indorsing a cheque or giving a receipt to the bank for moneys in a savings bank account, is not only to have it declared that the property upon the death of the donor ceased to be part of his estate and became the property of the donee, but that the executor or administrator is a trustee for the donee to make the gift effectual. See Williams on Executors, 9th ed., pp. 687-8, and cases there cited.

Having regard to the language of the whole section, I think it quite clear that the Legislature never intended that a claim of this nature should be embraced in the words "claim or demand against the estate."

Even if it should be held that the Surrogate Court has jurisdiction, under sec. 69, to adjudicate upon claims of this nature, that jurisdiction was limited to \$500 when the proceedings began, and is now limited to \$800 by 1 Geo. V. ch. 18; and, in the

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absence of express statutory provision, consent of the parties would not confer jurisdiction upon the Judge to adjudicate upon the matter as a Judge of the Surrogate Court; and, if he did so, his decision should be regarded, not as a judgment of the Court, but as that of a private tribunal constituted by the parties; in other words, as that of a quasi-arbitrator; and would be appealable only as an award where the right of appeal was reserved by the consent under which he acted, as provided in sec. 17 of the Arbitration Act, 9 Edw. VII. ch. 35.

In *Canadian Pacific R.W. Co. v. Fleming* (1893), 22 S.C.R. 33, the learned Chief Justice says, at p. 36: "It is well settled by authority that . . . where a jurisdiction beyond the ordinary jurisdiction which it has by general law is conferred upon a Court of justice by an arrangement between the parties, its decision is regarded as that of a private tribunal constituted by the parties, such as a board of arbitrators, and cannot be reviewed, in appeal or otherwise, as judgments pronounced in the regular course of its ordinary procedure may be reviewed and appealed from."

See also *Attorney-General of Nova Scotia v. Gregory* (1886), 11 App. Cas. 229; and *Burgess v. Morton*, [1896] A.C. 136.

I think, under the terms of the consent here, the parties have a right of appeal from the judgment, as from an award, to a Judge in Single Court, under the Arbitration Act.

Now, upon the merits, while I might have come to a different conclusion from that arrived at by the learned trial Judge, had I heard and seen the witnesses, I cannot say that his finding is wrong, assuming that he is right in discrediting the claimant and her daughter, on account of their demeanour in the witness-box. He may have misjudged their truthfulness; but, as he has so pointedly observed upon their demeanour, and as their evidence does on material points conflict with evidence adduced for the administrators, which is believed, and that adduced by the claimant is not believed, there was not sufficient evidence to support the position of the claimant in regard to the alleged *donatio mortis causâ*.

In *Coghlan v. Cumberland*, [1898] 1 Ch. 704, Lindley, M.R., in delivering judgment, at p. 705, observes: "It is often very

difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the Judge who saw the witnesses."

Bearing this rule in mind, and as it does not appear from the judgment or from the evidence that the learned Judge has misapprehended the effect of the evidence or failed to consider a material part of it, the case cannot be brought within such cases as *Beal v. Michigan Central R.R. Co.* (1909), 19 O.L.R. 502.

The appeal must, therefore, be dismissed with costs.

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[IN THE COURT OF APPEAL.]

RE CITY OF WEST TORONTO AND TORONTO R.W. CO.

*Street Railways—Jurisdiction of Ontario Railway and Municipal Board—Order for Repair and Renewal of Tracks—Agreements with Municipality—Construction—"Construct," Meaning of—Dangerous Condition of Tracks—Ontario and Municipal Board Act, 1906, secs. 63, 64—Ontario Railway Act, 1906, secs. 2(21), 164—Ontario and Municipal Board Amendment Act, 1910—Application to Pending Proceedings.*

*Held*, that the Ontario Railway and Municipal Board had power, under secs. 63 and 64 of the Ontario Railway and Municipal Board Act, 1906, to make an order requiring the Toronto Railway Company to repair, renew, and restore to a suitable and satisfactory condition the tracks and substructure in use upon a certain street in the city of Toronto, formerly in the town of Toronto Junction, over which the company operated its tracks; and there was jurisdiction to make the order notwithstanding the absence from the record of the Toronto Suburban Street Railway Company.

Construction of the agreement between the Corporation of the Town of Toronto Junction and the Toronto Suburban Street Railway Company, of the 11th November, 1899, validated and confirmed by 63 Vict. ch. 103(O.), and set out in schedule B. thereto; and of the agreement between the Corporation of the Town of Toronto Junction, the Toronto Railway Company, and the Toronto Suburban Street Railway Company, of the 6th October, 1899, validated and confirmed by the same statute, and set out in schedule D.

"Construct," in clause 12 of the first-mentioned agreement, requiring the company to construct the tracks and superstructure according to the best modern practice from time to time in general use, is not confined to original construction, but includes necessary reconstruction—the meaning is "construct from time to time" or "construct and maintain."

*Held*, also, that the railway was a street railway, within sec. 2(21) of the Ontario Railway Act, 1906; sec. 164, which provides for the case of a railway becoming dangerous from lack of repairs or renewals, applies to street railways; and the Board had power, under that Act, to deal

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with such a situation—that is, of danger to the public—independently of the agreements between the municipality and the railway company. *Semble*, also, that the Ontario Railway and Municipal Board Amendment Act, 1910, passed while the proceedings before the Board were pending, but before the hearing, under which the powers of the Board were enlarged, also applied—the effect of certain sections of the new Act being to modify the general rule that pending proceedings are not to be affected by new legislation.

APPEAL, by special leave, by the Toronto Railway Company from an order of the Ontario Railway and Municipal Board, dated the 8th August, 1910, made upon the application of the Corporation of the City of West Toronto, complainant, directing the Toronto Railway Company forthwith to repair, renew, and restore to a suitable and satisfactory condition the tracks and substructure on a certain portion of Dundas street used by the Toronto Railway Company.

April 28. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, and MAGEE, JJ.A., and MIDDLETON, J.

*J. W. Bain, K.C., and M. Lockhart Gordon*, for the Toronto Railway Company. The Ontario Railway and Municipal Board had no jurisdiction to make the order appealed from. The Toronto Suburban Street Railway Company is a necessary party to the proceedings. The Toronto Railway Company is not the owner of the portion of the railway in question, and, having merely running rights over this portion of the road, is under no obligation to the complainant to maintain or repair it. Any obligation to construct, maintain, or repair is the obligation of the Toronto Suburban Street Railway Company: 63 Vict. ch. 103; *Sevenoaks Maidstone and Tunbridge R.W. Co. v. London Chatham and Dover R.W. Co.* (1879), 11 Ch. D. 625; *Winch v. Birkenhead Lancashire and Cheshire Junction R.W. Co.* (1852), 5 DeG. & S. 562. The Board had no power to compel the appellant to reconstruct or repair, and thus improve, the property of the Suburban company. It would be an illegal use of the funds of the appellant, under its charter, to do this reconstructing: *Ayles v. South Eastern R.W. Co.* (1868), L.R. 3 Ex. 146. The Act of 1910 (ch. 83) was not in force when the matter came before the Board, and so its provisions are not applicable. The words “any railway company” in secs. 2 and 3 of that Act mean “any railway company which has power to repair:” Stroud’s

Judicial Dictionary, *sub verb.* "any;" *River Wear Commissioners v. Adamson* (1876), 1 Q.B.D. 546; *Poulterers' Co. v. Phillips* (1840), 6 Bing. N.C. 314; and the appellant had not such power.

*H. L. Drayton*, K.C., for the Corporation of the City of West Toronto. The Board has found as a fact that the tracks in question are dangerous, and are maintained and operated by the appellant, and these findings are binding and conclusive. The Board, in such circumstances, has full and complete jurisdiction to make the order in appeal: the Ontario Railway and Municipal Board Act, 1906, secs. 16(a), 17, 19(d), and 46; also the Act of 1910 (ch. 83), secs. 3 and 7. Section 8 of that Act makes it clear that sec. 3 would apply to these proceedings. The appellant is bound to maintain the tracks in question in a proper and sufficient manner, under the Railway Act, as well as under the agreements relating to such tracks and the operation of the appellant's railway. The Board has power to order repairs, outside of the Act forming such Board, by the general statute, the Railway Act of 1906, sec. 164. Under the agreements, there is only one construction, and that is, that the Toronto Railway Company assumes the burden of the Suburban company under the original agreement. The Suburban company is not a necessary party.

*Bain*, in reply. The Board has ordered us to reconstruct, not to repair, so the sections in the statutes about repair do not apply. "Company," in the Acts referred to, means the Suburban company, and that company should do the reconstructing.

November 4. The judgment of the Court was delivered by GARROW, J.A.:—Appeal, by leave, from the order of the Ontario Railway and Municipal Board.

The only question involved is as to the jurisdiction or power of the Board to make the order complained of. We have, of course, nothing to do with the merits.

Section 63(1) of the Ontario Railway and Municipal Board Act, 1906, provides: "Where it is alleged by a municipal corporation having jurisdiction over, or owning, or maintaining a highway, along which a railway is operated, in whole or in part, under an agreement between such municipality and the company

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operating the railway, that the company has violated or committed a breach of such agreement, or where it is alleged by such company, that such municipality has violated or committed a breach of such agreement, the Board shall hear all matters relating to such alleged violation or breach of agreement, and shall make such order as to the same as to it may seem, having regard to all the circumstances of the case, reasonable and expedient, and in such order may in its discretion direct the company or the municipality to do such things as are necessary for the proper fulfilment of such agreement, or to refrain from doing such acts as constituted a violation or a breach thereof."

And sec. 64 empowers the Board, "except when otherwise expressly provided, notwithstanding anything in this Act, or the said Act, or in any agreement contained, in any proceeding under this Act . . . to construe and determine the proper meaning of . . . any agreement between a municipal corporation and a company, or between two or more companies, and the decision of the Board on any question of fact shall be final."

One of the agreements in question was made between the Corporation of the Town of Toronto Junction, of the first part, and the Toronto Suburban Street Railway Company, of the second part, and is dated the 11th November, 1899, and was validated and confirmed by the statute 63 Vict. (1900) ch. 103, in schedule B of which it is set out.

The other agreement in question, was made between the Corporation of the Town of Toronto Junction, of the first part, the present appellant, of the second part, and the Toronto Suburban Street Railway Company, of the third part, and is dated the 6th October in the same year, 1899, and was also validated and confirmed by the same statute, and is set out in schedule D thereto.

At the time the first of these agreements was made, the Toronto Suburban Street Railway Company had secured franchises enabling it to run lines of railway along certain streets in the municipality of Toronto Junction, and it was apparently proposed, as appears in a recital, that, if the company became a party to an agreement with the appellant, under the terms of which the regular Dundas street service of the appellant should be extended



to the corner of Keele and Dundas streets, then, subject to certain terms and conditions, the corporation would, in substitution for the franchise already granted, grant a new and more extended franchise and make certain other concessions as to mileage, rental, exemption from taxation, and the supply of water at cost.

The second agreement, although a few days prior in date, seems to have been concurrently made to carry out the recital from which I have quoted. By it, the Suburban company and the corporation, accordingly, granted to the appellant, for a period of twenty-three years from the 1st September, 1908, the right to run cars over Dundas street, between certain limits therein prescribed, together with the right, in common with the Suburban company, to operate a "Y" on Keele street and on Dundas street. And the appellant and the other parties to the agreement each with the other agreed (among other things) to abide by and observe the covenants and conditions contained in a number of specific clauses in the other agreement, so far as applicable to that portion of the railway to which the second agreement extended, and to be bound thereby as if the same clauses had been inserted in the second agreement and made binding upon the appellant.

The clauses in the first agreement, so specified and incorporated into the second, are 4, 5, 8, 12, 13, 14, 15, 22, 24, 25, 34, and 35, only a few of which are pertinent or need now be referred to.

Clause 5 provides that the respondent will from time to time construct, reconstruct, and maintain in repair the street railway portion of the roadways traversed by the railway, but not the tracks, substructure, or superstructure required for the railway.

Clause 12 requires the company to construct the tracks and superstructure according to the best modern practice from time to time in general use . . . and that all changes in the tracks, rails, and roadbed, construction of new lines or additions to old ones, should be done under the supervision and to the reasonable satisfaction of the respondent's engineer.

Clause 15 provides that the respondent shall have the right to take up the streets traversed by the railway lines for all purposes, including altering grades, constructing or repairing pavements, sewers, etc., without being liable for compensation or

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damage to the company, but the work to be proceeded with with due diligence, and upon completion the railway line, rails, and substructure should be left in substantially the same state and condition as before the commencement of such work or improvements. The other sections do not require to be noted for the present purpose.

Clause 6 of the second agreement obliges the appellant to operate each day its regular Dundas street service along Dundas street, between the easterly limit of the town and the westerly limit of Keele street, the cars to be those operated on the regular Dundas street service in the city of Toronto.

Clause 7 provides that, if the appellant should wilfully fail for the space of one week to operate according to the agreement, the failure would, at the option of the respondent, work a forfeiture of the franchise; but the case of a failure or neglect to run by reason of an accident to the roadbed or works or to a general strike or other unavoidable cause, was excepted.

Clause 8 provides that, so long as the appellant continues to operate its cars under the agreement, the other company shall be relieved of its obligation to operate; and clause 10 provides that this agreement shall not be binding on the Suburban company until the first agreement before referred to is confirmed by statute.

The corporation, acting under the terms of clause 15, took up the railway tracks temporarily for the purpose of repaving the street; and, when the paving work was completed, relaid the track, substantially, as found by the Board, as it was before.

The track, however, is old and worn, and is out of repair and has become unsafe and dangerous; and the present application was for an order compelling the appellant to construct tracks and substructure on Dundas street and on the "Y's."

The appellant, by its written reply, admits that the track is unsafe, but says that it is under no obligation to repair.

The order made by the Board was that the appellant should forthwith repair, renew, and restore to a suitable and satisfactory condition the tracks and substructure in use upon that portion of Dundas street between the easterly limit of the former city of West Toronto and the westerly limits of Keele street

north of Dundas street, and on Dundas street west of Keele street, over which the appellant operates its cars.

One of the appellant's main contentions was, that there was no jurisdiction or power to make the order, in the absence from the record of the Toronto Suburban Street Railway Company; and, while in some respects it would have been more satisfactory to have had that company also served and represented upon the application, the failure to do so is not, in my opinion, fatal. The appellant, it is reasonably clear from a perusal of the agreement, was intended to be substituted for and to assume the obligations of the Toronto Suburban Street Railway Company, in respect of that portion of the latter's line of railway covered by the agreements; indeed, it is only to the appellant that the extended franchise was granted by the corporation, and not to both companies. And if, as between themselves, the appellant is entitled to any relief over against the other company, the right to such relief will not be prejudiced by the order.

The duty to maintain and repair the track or line of railway is unfortunately not clearly expressed in the agreements, although there can be no reasonable doubt, reading the whole, where such duty was intended to lie.

Under clause 5, the corporation assumes the duty of constructing, reconstructing, and maintaining in repair the street railway portion of the roadway on the streets traversed by the railway system, but not the tracks, substructure, or superstructure required for the railway. And by clause 15, the latter part, it is provided that "in the event of the company desiring to make any repairs or alterations in the ties, stringers, rails, turnouts or curves on paved streets the portion of the roadway torn up in so doing shall be repaved by the corporation, but at the expense of the company."

These clauses clearly seem to imply, if they do not express, that the duty to maintain and repair the railway line shall rest upon the operating company, and certainly in no sense upon the corporation.

Clause 12, chiefly relied on by the respondent, is somewhat halting. "Construct" is a proper word to use when a line of railway is to be built, but, once it is built, as this was when the

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agreement was made, it is not easy to give it at least its primary meaning. And yet it clearly must have been intended to mean something important in furtherance of the purposes of the agreement. And, after much consideration, the only reasonable meaning I can conceive of as applied to the circumstances is, "construct from time to time," or, in other words, "construct and maintain," which construction, if I am right, is sufficient for the respondent's purposes, and does, I believe, no violence either to the intention or to the language which the parties have used. The clause even seems, by its terms, to anticipate, not merely original construction, but necessary reconstruction, for it says ". . . shall construct . . . according to the best modern practice from time to time in general use," etc. Such language, confined only to original construction, would be, I think, quite inappropriate.

But the matter does not entirely rest upon the obligations contained in the agreements between the parties. The railway is a street railway, within sec. 2(21) of the Ontario Railway Act, 1906; and sec. 164, which provides for the case of a railway become dangerous from lack of repairs or renewals, expressly applies to street railways. The Board, after the present proceedings began, as appears in the judgment of the Chairman, directed its own engineer to make an inspection and report, as required by that section; and upon that, as well as upon the evidence adduced on the subsequent hearing, the order was based. Power to deal with such a situation, that is, of danger to the public using the railway, is not necessarily based upon an agreement between the municipality and the railway company, but is clearly intended to be invoked for the protection of the public, any member of which may be the complainant. And, in addition, it is not, I think, beyond question that the Ontario Railway and Municipal Board Amendment Act, 1910, passed while the proceedings were pending, but before the hearing, under which the powers of the Board were considerably enlarged, does not apply. By sec. 7, secs. 2, 3, 5, and 6 are made applicable to street railways. And by sec. 2 the Board is empowered to act after hearing, either upon a complaint, or upon its own motion. The effect seems to be to modify the general rule that pending

proceedings are not to be affected by new legislation unless that intention clearly appears. And, as significant of such an intention, in addition to the new power given to act upon its own motion, sec. 65 of the Ontario Railway and Municipal Board Act, 1906, which declared that the Act should not affect any action or other proceeding pending when the Act came into force, is, by sec. 8, repealed.

Upon the whole, I am clearly of the opinion that the Board had power and jurisdiction to make the order, and that this appeal should be dismissed with costs.

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[IN THE COURT OF APPEAL.]

RE MCALLISTER.

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*Will—Construction—Devise—"Trustee of his Heirs"—Legal Estate for Life—Equitable Estate in Remainder—Rule in Shelley's Case—Direction for Conversion of Estate—Bequest of Personality—Life Interest in Part of Estate.*

*Held*, by the majority of the Court, affirming the judgments of RIDDELL, J., and a Divisional Court, 24 O.L.R. 1, that the rule in Shelley's case did not apply to the devise to the testator's son H., and that H. took under the will a legal estate for his life and an equitable estate in remainder for those who should be his heirs at the time of his death. *Per* MAGEE, J.A.:—If the devise were to be treated as a devise of realty, the limitations were such as to give the equitable fee simple to H., the legal estate being in the executors, if not outstanding in mortgagees; and, if the legal estate was not vested in the executors or mortgagees, H. would be entitled to the legal and equitable estate in fee simple. But, looking at all the provisions of the will, it appeared that the testator contemplated conversion of his estate; and, therefore, it should all be deemed personality. Treating the gift as a bequest of personality, it was not to be governed by the same rules as a devise of realty or one of mixed realty and personality; and the conclusion was the same as that of the majority of the Court, viz., that H. should be declared entitled to a life interest only.

APPEAL by Harmon McAllister from the order of a Divisional Court affirming the order of RIDDELL, J., upon a summary application under Con. Rule 938, determining certain questions arising in the administration of the estate of John James McAllister, deceased, as to the proper construction of his will: 24 O.L.R. 1.

September 19. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, J.J.A.

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*E. D. Armour*, K.C., for the appellant. The only question for decision by the Court is, whether the appellant, under the will in question, took the whole estate in the interest devised to him, or a life estate merely. It is submitted that by virtue of the rule in *Shelley's case* the appellant took the whole estate, inasmuch as under the will he was entitled to the whole legal and beneficial interest for his life, which after his death descends to his heirs. The judgments appealed from are wrong in holding that the limitation to the heirs of the appellant was an equitable estate, as it cannot vest during his lifetime, but will vest as a legal estate in possession at his death. The authorities cited by the learned Chancellor are distinguishable from the case at bar. Reference was made in this connection to *Greaves v. Simpson* (1864), 10 Jur. N.S. 609; *Evans v. Evans*, [1892] 2 Ch. 173; *Haight v. Dangerfield* (1903), 5 O.L.R. 274; *Merest v. James* (1821), 6 Madd. 118; *Collier v. McBean* (1865), 34 Beav. 426. Reference was also made to *Re Thomas* (1901), 2 O.L.R. 660.

*I. F. Hellmuth*, K.C., for the infant respondent, argued that the case at bar was not governed by the rule in *Shelley's case*, and relied on the reasons given and the cases cited by the learned Judges in the Courts below.

*E. F. Lazier*, for the executors, submitted the rights of his clients to the Court.

November 4. Moss, C.J.O.:—The question for decision in this appeal is admitted to be one of some difficulty. It arises out of the terms of one clause of the will of John James McAllister.

For the most part, the will is couched in language quite sufficiently appropriate and accurate to express in intelligible fashion the testator's intentions and wishes. But in the concluding sentence of the 4th clause, the draftsman appears to have lapsed into language which, when contrasted with the rest, appears loose and vague. Whatever may have been the testator's intention, in penning it there is a failure to give clear expression to that intention. It almost seems as if it was an afterthought, written by some one, perhaps the testator himself, not skilled in the expression of testamentary desires. The introduction of this sentence has given rise to the whole difficulty. The provisions and directions in the other parts of the will are clear and intel-

ligible. The testator was, it appears, possessed of both real and personal property, and he gave his wife an estate for life in the whole, with certain directions as to the application of some of the funds, and as to sale of the real estate in the discretion of his executors. The remainder expectant upon the termination of his wife's life estate was still to be disposed of, and this was dealt with by the 4th clause as follows: "Upon the death of my said wife I give devise and bequeath all my real and personal property whatsoever and wheresoever situate including the principal money of the proceeds of my real estate (should it be sold) and of the said life insurance or all such stocks bonds or securities should the estate be sold and invested as provided under clause three (3) of this will to my three children, Harmon, John, and Sarah Annie Greer, share and share alike . . . ." Up to this point there is no want of certainty, nor is there any difficulty in gathering the meaning of the language. But then comes the following, "subject nevertheless as to the share therein of my son Harmon that he shall hold the same as trustee of his heirs and use the income as he may see fit and that he shall not be accountable for the expenditure of such income but that it shall be left entirely to his judgment and discretion."

The difficulty is to ascertain the nature and extent of the limitation thus expressed with regard to the interest given to Harmon McAllister in the one-third share of the testator's estate.

As has been frequently said, the first duty of the Court in expounding a will is to ascertain what is the meaning of the words used by the testator, *i.e.*, what is the meaning of that which he has actually written, not forgetting to attribute to technical terms or words of known legal import their proper legal effect, unless something is found to satisfy the mind that they were meant by the testator to be used in some other sense, and to shew what that sense is: *Roddy v. Fitzgerald* (1858), 6 H.L.C. 823, *per* Lord Wensleydale, p. 876. By this means the testator's intention is got at, and it then remains to ascertain in what manner effect shall be given to the intention.

The language of the portion of the 4th clause of the will now under consideration is peculiar. It is quite plain that the testator intended to cut down or limit the estate or interest of Harmon which the earlier words of the clause would, if left unqualified,

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have vested in him. This object is sought to be expressed by declaring that as to the one-third share expressed in the earlier part of the clause to be given to Harmon, "he shall hold the same as trustee of his heirs." According to this, the intention was, that he was not to hold the share for himself, but for others. But for the subsequent directions as to his enjoyment of the income, this might have deprived him of all beneficial interest, just as a gift or devise to A. to hold as trustee for B., without more, would leave A. without any beneficial interest. It is plain that the testator did not intend to give the estate wholly to Harmon, but to constitute him a trustee of the whole, leaving to him the enjoyment of the income until the interest of the *cestuis que trust* vested in possession. Does the nomination of Harmon's "heirs" as the *cestuis que trust* enlarge the beneficial interest intended to be given to Harmon by operation of the rule in Shelley's case, or otherwise?

I do not think that such is the effect. It seems to me that the rule in Shelley's case does not apply, under the circumstances.

Reading the devise to Harmon as a whole, the effect is, that he is to hold the entire estate as trustee, with the right to use the income without being accountable to any one for its expenditure. The testator's design appears to have been to preserve the estate for such persons as would at Harmon's death be his heirs, preserving to him the enjoyment of the income in the meantime.

If this design could only be accomplished by regarding the word "heirs" as embracing the whole series of heirs in a course of devolution, then, in order to give effect to the intention, it might be necessary that the word "heirs" should be read as a word of limitation, and not of purchase. But the operation of the trust is, I think, sufficient to carry the estate to the intended beneficiaries, when the period of their ascertainment arrives, thus excluding the necessity for resorting to the other construction.

It may be that, in view of the directions following the declaration that Harmon is to hold as trustee of his heirs, the latter word ought to be read as meaning "children"—a reading which would not assist the contention made on Harmon's behalf.



The question is one not wholly free from doubt; but, upon the best consideration I can give it, I am unable to say that the judgment appealed from is wrong.

I, therefore, think that the appeal must be dismissed.

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GARROW and MACLAREN, JJ.A., concurred.

MEREDITH, J.A.:—There can be no doubt that the testator did not intend that his son Harmon should take the property in question absolutely; it is quite clear that he intended that Harmon should take a less interest than that given to his brother John and sister Sarah: I can have no doubt that the testator meant that his son Harmon should take a life estate at most; and that his heirs—whatever he meant by that word—were to take the residue.

This is hardly disputed; but it is said that, by reason of the rule in Shelley's case, Harmon must take absolutely: and, if that rule does apply, there can be no doubt that the purpose of the testator must fail; but the rule does not apply if the words "his heirs" mean his children, or anything less than his heirs generally; or if the estate of Harmon be a legal one and that of the heirs an equitable one.

Without considering the former question, it seems to me that the estate of Harmon is a legal one—for life, and that of "his heirs" an equitable one—to the remainder, and so the rule does not apply; and, therefore, effect may be given to the intention of the testator, notwithstanding that obstinate rule, which, though it may sometimes work for good, sometimes does much mischief, making a new will directly opposed to the testator's intention.

I would dismiss the appeal.

MAGEE, J.A.:—The testator, John James McAllister, died in 1904. It does not appear that any caution has been registered by his executors so as to prevent the real estate vesting in those entitled under the will.

If this could be looked upon as a direct devise of real estate, I am of the opinion that Harmon McAllister would be entitled to an equitable fee simple in one third, or else to the beneficial legal fee simple.

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I will leave out of consideration the fact that the will refers to the existence of mortgages upon the property, because it is not shewn that such mortgages were outstanding at the testator's death, and it does not appear what their nature was. If the legal estate was outstanding in the mortgagee, then all the limitations under the will would be equitable, and the rule in Shelley's case would not be prevented from taking effect by the fact that one limitation was equitable and the other legal. See *In re White and Hindle's Contract* (1877), 7 Ch. D. 201.

The effect of the various clauses in the will was, however, such as, in my view, to give the executors the legal estate in the realty. There was no direct devise to them. If there had been, the power and directions to sell would have implied that they were not to be mere devisees to uses, but that the legal estate was to remain in them, instead of passing to the beneficiaries: *Richardson v. Harrison* (1885), 16 Q.B.D. 85.

But the testator must be taken to have known that his realty would, under the Devolution of Estates Act, vest in the executors. He evidently intended that during his wife's life they might hold the estate "intact." He gave them power to dispose of it at any time and receive and invest the proceeds or place them with a trust company; he authorised them to discontinue the services of his son in the management, and to determine what the son should be paid out of the revenue, and to apply part of his personalty towards reduction of the mortgages; he directed them, at his wife's death, to sell and divide the proceeds, or, if so arranged, apportion or divide the property. These powers and duties imply not merely that the executors were to have a power, but that they were to retain by the force of the will the estate which the statute vested in them to enable them to exercise and perform those powers and duties—just as if there had been a devise to them. To continue this estate thus implied in them, it would not be necessary to register a caution. In this view, the legal estate in the whole fee simple was vested in the trustees, and the other limitations would be of equitable estate.

What then are the other limitations? He evidently intended his debts and the expenses and the interest on the mortgages to be paid out of either the income or the corpus of the estate, but

out of which may be a question. He gives the wife a life estate; then, after her death, he gives all his real and personal property, including the proceeds of the realty, if sold, and the securities and life insurance, to his three children, Harmon, John, and Sarah, share and share alike. If the will had stopped there, they would each have taken one-third in fee simple. But it goes on to add, "subject nevertheless as to the share therein of my son Harmon that he shall hold the same as trustee of his heirs and use the income as he may see fit and that he shall not be accountable for the expenditure of such income but that it shall be left entirely to his judgment and discretion."

It is not disputed that Harmon would, under this, take at least a life interest in the realty, if realty passed, nor that the remainder after his life interest was devised to him to hold in trust for his heirs. Then, would the interest of the heirs be any different because the devise was to him, instead of to some one else, to hold in trust for them? I cannot see that it would in any way—nor do I think that the words "to hold as trustee of" differ in effect from the words "in trust for." If real property is simply devised to A. in trust for B., it goes to B., whether it is a legal or equitable estate. Equally, if the devise is to A. in trust for the heirs of B., it goes to those heirs. If the devise is not in that simple form, but there is something to imply that the estate is intended to remain in A. in order that some purpose of the will may be carried out, then, of course, effect must be given to that. The result is well illustrated by the two cases of *In re Hart's Estate*, [1883] W.N. 164, and *Richardson v. Harrison*, 16 Q.B.D. 85. In both there, in effect, was a devise to A. (in default of appointment) to the use of the testator's daughter for life for her separate use and after her decease in trust for her heirs. In the former case it was held that, because the daughter's life estate was only an equitable one, it did not coalesce with the remainder to the heirs so as to give her the fee. That was followed in the latter case by the Queen's Bench Division; but, on appeal, it was pointed out that the will before the Court contained a power to A. to sell, and therefore the legal estate was intended to remain in him, and therefore both the life estate of

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the daughter and the remainder to her heirs were equitable, and coalesced under the rule in Shelley's case, and she took the equitable fee simple.

In the present case, there are no duties or powers of Harmon McAllister from which it can be inferred that the estate was not intended to pass to the heirs, whether it was legal or equitable. True, there is a power given to him and his brother and sister conjointly to arrange a division, but that does not require an estate in Harmon—it only designates the lands in which the estate is to exist; and, indeed, if a conveyance from the executors were necessary, as I think it would be, the arrangement would be preliminary to the conveyance and the limitations therein, and would have to do, not with the form or effect of the limitations, but only with the parcels. True, also, that the whole realty and personalty is in the first place given to Harmon, John, and Sarah, but Harmon's share is at once differentiated from the others and its destination declared.

Nothing was in all probability farther from the testator's mind than the idea that the land would not vest in Harmon's heirs. He was evidently wishing to guard against it going elsewhere and to secure that Harmon would transmit it to them. What he had in mind by "heirs" may be a matter of conjecture—possibly heirs of the body, possibly only children—perhaps he never considered whether Harmon's heir might not be a distant relation—we can only look at his will.

If the estate was given to the heirs as heirs, and not as persons, and given in remainder after the life estate to Harmon, then the rule in Shelley's case steps in and says that the two coalesce unless they differ in character as being legal or equitable. If the legal estate was in a mortgagee, or if it remained vested in the executors, then both the limitations were equitable. If the legal estate was in the testator, and if the executors did not take the legal estate or took it for only the life of the wife, then both the limitations would be legal. In either case Harmon would have the beneficial fee simple.

In *Herrick v. Franklin* (1868), L.R. 6 Eq. 593, we have an instance where the life tenant was the trustee. The testator directed his real and personal estate remaining at his wife's

death to be placed in trust, and he appointed his son and daughter (with the wife) trustees, and, subject to making provision for a lunatic brother, they were, after the wife's death, to receive the income, and, after their decease, their heirs. The Vice-Chancellor held that the son and daughter were jointly entitled to the real estate in fee, and that they had a life interest in the personalty. But he declined to decide whether their heirs were entitled to the personalty after the life estate. In *Comfort v. Brown* (1878), 10 Ch. D. 146, Bacon, V.-C., refused to accept that as a decision that the personalty also did not go absolutely to the son and daughter. But I am at present dealing only with the realty.

If I am right that the life estate and the remainder would coalesce, it is manifest that such a result was not in the testator's mind. It would put Harmon on the same footing as his brother and sister. He intended Harmon to have a life estate. But such, no doubt, was the intention of very many of the testators to whose wills the rule in Shelley's case has been applied. That rule may have a beneficial side, in occasionally preventing the tying up of property, and Courts have sometimes not been disposed to strain construction to prevent its application; while, on the other hand, we find comments such as those of Lord Esher, M.R., who, in following it in *Richardson v. Harrison*, said (16 Q.B.D. at p. 104): "I have heard some Judges, say that in their opinion it was the most unjust decision that ever was come to. I shall not give that as my view: but it is a decision which I never could understand how anybody could come to."

In truth, however, the rule being a rule of law and not of construction, it is actually necessary to ascertain the intention of the testator before the rule of law can be applied. If he intends the estate to go to A. for life, and then to his heirs as heirs and not as persons, the law attaches a consequence to his intent which perhaps he did not foresee, but for which it has to rely upon his own words.

The judgment of the Divisional Court was based upon two grounds: first, that, because Harmon took a legal estate for life and the heirs only an equitable remainder, therefore the two

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could not coalesce; and, second, that the word "heirs" was intended to describe the persons who would, on Harmon's death, be entitled to his real estate.

As already stated, the reasons for the first conclusion did not, in my view, exist; and as to the second ground, I am unable to find here any expression or intimation which, upon the authorities, would enable the Court to interpret the word "heirs" as a word of purchase and not a word of limitation.

The cases referred to in the judgment are hardly applicable. In *Greaves v. Simpson*, 10 Jur. N.S. 609, the limitation was to the heir or heiress at law, his or her heirs and assigns forever. In *Evans v. Evans*, [1892] 2 Ch. 173, it was to such person or persons as at the decease of the life tenant should be his heir or heirs at law and the heirs and assigns of such person or persons. In *Haight v. Dangerfield*, 5 O.L.R. 274, it was to the life tenants' respective lawful heirs then surviving them share and share alike. The difference is manifest between those cases and the present one, in which the limitation is to the "heirs" *simpliciter*.

The result of the decisions as to the rules of construction applicable is stated in Theobald on Wills, 7th ed. (1908), pp. 417, 419, 420: "A. Where the words 'heirs' or 'heirs of the body' are used in the limitation of the inheritance the rule (in Shelley's case) applies—although the limitation of the freehold to the ancestor may be followed by words clearly indicating an intention that his estate should be for life only . . . The words 'heirs' or 'heirs of the body' will, however, be construed as words of purchase: 1. When words of limitation are superadded to them inconsistent with the nature of the descent pointed out by the first words, as where the limitation is to a man for life, and after his decease to the use of his heirs and the heirs female of their bodies . . . 2. Where the testator has, either by express words, or by implication, interpreted the meaning he intended to convey by the term 'heirs' or 'heirs of the body,' those words may be words of purchase." The learned writer refers to numerous examples in which the context shewed that the testator meant by "heirs," children, sons, etc. There is here, however, nothing on which to base such an interpretation of the word.

The conclusion to which I come, therefore, is, that if it were to be treated as a devise of realty, the limitations are such as to

give the equitable fee simple to the son Harmon, the legal estate being in the executors, if not outstanding in mortgagees; and that, if the legal estate is not vested in the executors or mortgagees, Harmon would be entitled to the legal and equitable estate in fee simple.

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But there arises the question whether this can be deemed a devise of realty. Upon the death of the wife, the will directs the executor to sell, unless by unanimous agreement the children can arrange with the executor to apportion and divide the property without sale. But, before giving this direction, the testator gives all his real and personal property to his three children, share and share alike. That was his main object. The question of division would arise, and he provided for that by the direction to sell unless arranged to dispense with sale. He, therefore, contemplated that the lands might not be sold at all. Apart from that provision in the will, if the property were given to the three children absolutely, they would have the right to prevent a sale, and to call for a conveyance to them from the trustees, if the legal estate were vested in the latter: *Meek v. Devinish* (1877), 6 Ch. D. 566. But that right is irrespective of the testator's intention. We have to see whether he intended the property to be considered realty or personalty. If there were an imperative direction to sell, then it would have to be deemed personalty: *Doughty v. Bull* (1725), 2 P. Wms. 320, in which there was a devise to trustees; and *In re Raw* (1884), 26 Ch. D. 601, in which there was a direction to the executors to sell without a devise to them; and *Burrell v. Baskerfield* (1849), 11 Beav. 525, in which there was an implied trust as well as power. Here we have the direction to sell. As already mentioned, I think also that there was the implied devise to the trustees; but, at all events, there was the direction to sell. That was what was to be done, unless it was interfered with in the way specified, that is, by the unanimous consent of the three children and arrangement with the executor. If it were an absolute devise to Harmon, as well as to his brother and sister, the three could, as already mentioned, prevent a sale, and could decide to accept the property as realty: *Meek v. Devinish, supra*; and see *In re Davidson* (1879), 11 Ch. D. 341. But, whether so prevented or prevented under the

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will, it would be an interference with the condition of affairs directed by the will—a condition which any one of the devisees or beneficiaries was entitled to have brought about and maintained. I am, therefore, of opinion that the testator contemplated conversion of his estate; and, therefore, that it should all be deemed personalty. I am not overlooking the fact that he wished the whole of Harmon's share to go to his "heirs."

Treating it then as a bequest of personalty, it is not to be governed by the same rules as if it were a devise of realty or one of mixed realty and personalty (see *Knight v. Ellis* (1789), 2 Bro. C.C. 570, and *Ex p. Wynch* (1854), 5 DeG. M. & G. 188); and I agree with the conclusion come to by the Court that Harmon should be declared entitled only to a life interest.

*Appeal dismissed.*

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[IN THE COURT OF APPEAL.]

BIGELOW v. POWERS.

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*Partnership—Operation of Thresher—Injury to Property of Partner—Contract—Breach—Damages—Negligence—Right of Partner against Partnership and Co-Partners—Contribution—Findings of Jury—Unsatisfactory Method of Arriving at Finding—New Trial.*

The plaintiff and twenty-six other farmers purchased a "threshing machine outfit," with the intention of carrying on the business of threshing grain for farmers and others. It was not intended that each of them should be personally concerned in the actual work to be done. They chose from among themselves a board of management, adopted a firm name, and from time to time held meetings, at which directions were given with regard to the business. At one of these meetings, D. was appointed manager, and was authorised to transact the business of the firm in making engagements to thresh, conducting the work thereof, and controlling and supervising the machinery and its workings. It was contemplated that the members of the firm would deal with the firm in providing for their own threshings; and it was part of the agreement that their threshings must be paid for at the same rates as those charged outside. It was not contemplated that each of the twenty-seven partners should, as between themselves, be endowed with full authority to act for the firm: the principal authority was delegated to the board and the manager acting under and authorised by it. The business was proceeded with under the management of D. The plaintiff, desiring to have his grain threshed, made arrangements with D., who undertook to do it in the usual course. The threshing outfit was taken to the plaintiff's farm and operated, D. being in charge of the engine, and G., a servant of the firm, in charge of the separator. The plaintiff took no part in the management or working of the outfit, and acted only as owner of the grain. While the work of threshing was proceeding, the plaintiff's barn took fire and was consumed, with other property. The plaintiff sued his twenty-six partners for the amount of his loss by fire. The jury



found that the fire originated from defects in the smoke-stack of the engine; that their existence was due to D.'s negligence; and that he was aware of them:—

*Held* (GARROW, J.A., dissenting), that, upon the facts and the findings of the jury (if they were to stand), the firm and the individual members were liable to make good to the plaintiff the loss and damage he had sustained, less his own contributory share; and that the judgment of MAGEE, J., 20 O.L.R. 559, ought not to be disturbed.

Save in so far, as against third persons, the plaintiff was bound by the acts of the board of management and the manager, he was not responsible for placing D. in a position of control and management of the engine and its appliances, and he was not aware of the defects owing to which, as alleged, the fire occurred. In fact and in law, it was a fallacy to say that the firm's acts were the plaintiff's acts, and that D.'s negligence and knowledge were the plaintiff's negligence and knowledge. The plaintiff's loss arose in the course of the business, and not in the course of any service that he was individually receiving because he was a member of the firm; and for such a loss he should be recouped by the firm, just as others would be. The technical objection that, the firm not being a legal entity, the partner cannot be both plaintiff and defendant, and that, if he sues the firm, he is suing himself, has been removed in the case of promissory notes and the like, and there is no good reason why it should bar an action like the present.

But *held*, having regard to the evidence in support of the allegation that the fire arose from or was caused by the engine, and the more than hesitation expressed by the jury in regard to their affirmative answer to the question, "Were the barn and goods of the plaintiff burned by fire caused by sparks from the engine owned by the members of the syndicate?" and to what then took place with regard to it (set out below), that there should be a new trial upon this material part of the case; and, looking also at the nature of some of the other questions and answers, there should be a new trial generally, if the defendants desired it; otherwise, the appeal from the judgment of MAGEE, J., should be dismissed.

*Per* GARROW, J.A.:—The case was like that of a man suffering injury by the use of his own machine, under the management of his own servant. The servant, if negligent, may be liable, but not a co-owner or a co-partnership. The partners, however numerous, do not in law acquire that quality of a separate entity which would enable one partner to sue the firm, as a shareholder may sue his company. Such a liability must rest upon contract, express or implied, or upon a breach of duty—and nothing of the kind was shewn. Also, there is no reasonable warrant in the evidence to justify a finding that the plaintiff's damage was due to any negligence on the part of D.

APPEAL by the defendants from the judgment of MAGEE, J.,  
20 O.L.R. 559.

April 26. The appeal was heard by MOSS, C.J.O., GARROW and MACLAREN, JJ.A.

*I. F. Hellmuth, K.C., and Eric N. Armour*, for the defendants. The evidence shewed that the plaintiff and defendants were partners together in the business of the syndicate, namely, threshing grain, and were co-partners and co-owners of the engine which is alleged to have set fire to the plaintiff's barn, and

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the engineer in charge of the engine was the common servant of both the plaintiff and the defendants. Therefore, the plaintiff has no right to either contribution or indemnity. The plaintiff cannot be both plaintiff and defendant in the same action: *Ellis v. Kerr*, [1910] 1 Ch. 529; Pollock on Partnership, 8th ed., p. 145. There was no evidence from which the jury could rightly find that the fire came from the engine in question: *Beal v. Michigan Central R.R. Co.* (1909), 19 O.L.R. 502. The method by which the jury arrived at their finding was a wrong one, so there should at least be a new trial.

*D. B. Simpson, K.C.*, and *A. J. Armstrong*, for the plaintiff. The arrangement which existed between the plaintiff and the defendants partook more of the nature of a syndicate or an unincorporated company. It lacked the element of a partnership, in that the different members of the syndicate were not possessed of agency powers to bind the others of them. Whether it is decided that the arrangement between the plaintiff and the defendants was a syndicate or was a partnership, the effect is and should be the same, namely, that the defendants are liable to make good the loss of the plaintiff in manner and form indicated in the judgment appealed from: *Thomas v. Atherton* (1878), 10 Ch. D. 185; Lindley on Partnership, 7th ed., pp. 534 and 592. The appellants err in asserting that the act occasioning the damage was an act of a common servant. The evidence discloses that the engine which caused the damage was defective, to the knowledge of members of the board of managers, as well as of the common servant, but not to the knowledge of the plaintiff. The plaintiff also relies upon the reasons contained in the judgment appealed from, and the authorities cited therein.

*Hellmuth*, in reply.

November 4. Moss, C.J.O.:—The principal point presented by this appeal is novel, and raises questions of some nicety and importance. The judgment appealed from is reported 20 O.L.R. 559.

Shortly stated, the case, as I understand it, is this. The plaintiff and twenty-six other farmers agreed to become the purchasers and proprietors of what is termed in the pleadings

and evidence "a threshing machine outfit"—terms which seem to describe sufficiently for the purposes of the case the machinery and appliances to be acquired—paying therefor the sum of \$2,700.

In its origin the transaction took the form of an order to the manufacturers for the supply of the machinery at the above price, signed by all the twenty-seven persons, each of whom was to pay \$100 of the purchase-price, and for that amount only each was to be liable to the manufacturers, but all were to join in four notes for \$675 each. In this way each was treated, so far as the manufacturer was concerned, as the holder of one undivided share, of the nominal value of \$100, in the machinery. But, as between themselves, they were the purchasers and owners of the machinery, contributing the purchase-money in equal shares. The object and intention of the purchase was to carry on the business of threshing grain for farmers and others, in their neighbourhood and elsewhere, by whom they might be engaged or employed for the purpose. It may be that some, if not all, had also in their minds the convenience in getting their own threshing done likely to result to themselves from the ownership of the outfit. From the beginning there was the intention of carrying on the business, but each was not to be personally concerned in the actual work to be done.

They agreed upon and adopted certain rules and regulations for the management of the general affairs. They agreed to choose and at their first meeting did choose from amongst themselves a committee or board of management, consisting of a secretary, a treasurer (who was also appointed president), and three directors, who were to be the executive body under whose direction the business was to be carried on. They adopted for use in business the firm name of "The Pioneer Threshing Syndicate of Clark Township." From time to time they held meetings at which directions were given with regard to the business. At one of these meetings, one Dowson was appointed manager. Some question has been raised as to the manner of his appointment; but, for the purposes of this action, it must be taken that he became and was an official of the firm, duly recognised and acting as a person authorised to transact the business of the firm, so

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far as making engagements to thresh, conducting the work thereof, and controlling and supervising the machinery and its workings, were concerned.

It was, of course, contemplated that the members of the firm, though there was no absolute obligation on their part, would deal with the firm in providing for their own threshings. Accordingly, it was part of the agreement that their threshings must be paid for at the same rates as those charged outside. Thus, while a firm was constituted of which each of the twenty-seven persons was a partner, it was evidently not contemplated that, as between themselves, each should be endowed with full authority to act for and on behalf of the firm. The principal authority was delegated to the board and the manager acting under and as authorised by it.

The business was proceeded with under the management of Dowson. In October, 1908, the plaintiff arranged with Dowson in the ordinary way for the threshing of his grain. Dowson undertook to do it in the usual course, and the threshing outfit was taken to the plaintiff's place and operated, Dowson being in charge of the engine, and one Gordon, also in the employ of the firm, being in charge of the separator. The plaintiff, on this occasion, took no part in the management or working of the outfit, and in no respect acted otherwise than as owner of the grain.

While the work of threshing was proceeding, the plaintiff's barn took fire and was consumed, together with a large quantity of grain and other produce and some farm implements and stock, the total value of which has been found by the jury to be \$3,601.

It was found by the jury that the fire originated from defects in the smoke-stack of the engine, and that their existence was due to Dowson's negligence, and that he was aware of them.

I shall refer again to the finding that the fire originated from or was due to the engine, and the evidence upon which it is based.

The first question, however, is, whether, upon the facts as stated, the firm and the individual members are liable to make good to the plaintiff the loss and damage he has sustained, less his own contributory share; and the second is, whether, if so, recovery may be had in the form in which it has been awarded in this action.

It is not questioned that, if the plaintiff was not a member of the firm, or if, instead of a firm of individual partners, it was an incorporated company in which the plaintiff was a shareholder, his remedy would be clear. But this does not appear to advance the inquiry.

The precise point does not seem to have arisen or to be noticed in any reported decision; and the text-books, in discussing the rights of partners *inter se*, do not deal with the precise point.

In Lindley on Partnership, 7th ed., p. 413, it is said: “. . . There is no authority for saying that if one of the members of a firm sustains a loss owing to some illegal act not attributable to him, but nevertheless imputable to the firm, such loss must be borne entirely by him, and that he is not entitled to contribution in respect thereof from the other partners.” It seems plain, however, that the reference is to cases where one partner has been subjected to loss by reason of having been obliged to make good to a third party the consequences of some illegal act on the part of the firm, and where the question has been whether he was excluded from the ordinary right of contribution upon the doctrine that as between wrongdoers there is no right to contribution. In the present state of facts, one partner has sustained a direct loss owing to an act of the firm, negligent and wrongful to such an extent that, if it occasioned loss to a third person, he could recover against the firm or the co-partners.

It may be said, as in the case put by the learned author, that there is no authority for saying, in such a case, that the loss thus sustained by the one partner must be borne entirely by him, and that he is not entitled to contribution in respect thereof from the other partners. In neither case does it follow from the absence of authority one way or the other that no such right of contribution exists.

The right to relief and the manner in which it may be enforced in cases where there is an admitted liability, as upon a promissory note of the firm held by one partner, may be considered as now well settled as the result of decisions or statutory provisions, to which it is unnecessary to make special reference.

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But the argument is, that, although acts or omissions out of which the claim arises may be said to be the acts or omissions of the firm as a whole, while in the ordinary course of the business through its ordinary agents and employees, and although the resultant injury is occasioned to or falls upon one partner in his individual capacity, yet, because he is a partner, he cannot be allowed to separate himself from the firm and hold it responsible for the damages he sustained.

I have referred to the limited rights of management or control possessed by the plaintiff and all those members not constituting the board of management over the conduct of the business. And, beyond question, he was not actively taking part as one of the firm in overseeing or directing the operations of the outfit while threshing at his place. Save in so far, as against third persons, he was bound by the acts of the board of management and the manager, he was not responsible for placing Dowson in a position of control and management of the engine and its appliances, and he was not aware of the defects owing to which it is alleged that the fire occurred. So far as the facts are concerned, it is a fallacy to say that the firm's acts were the plaintiff's acts, and that Dowson's negligence was his negligence, and that Dowson's knowledge was his knowledge.

Is it not equally fallacious in law? Suppose the case of a firm carrying on its business in a building beside or near the dwelling-house of a co-partner, which is owned solely by him in his private and individual capacity, and has nothing to do with the partnership or its property. Suppose that, owing to negligence on the part of the firm or its employees, neither participation in or knowledge of which is imputable to the partner in his individual capacity, an explosion occurs on the firm's premises which wrecks the partner's dwelling. Can it be the law that, under such circumstances, the loss of his dwelling must be borne by the partner alone? I am unable to see why the other members of the firm should be allowed to shelter the firm and themselves under the argument that, though true it is that the firm, and not the partner who suffered, caused the injury and loss, the law says that the partner was the author of his own injury and must himself bear the loss. I see no reason why it

should be so more than it is where there is an incorporated company, and the injury and loss is inflicted upon a shareholder. There is, of course, the long-existing technical objection that, the firm not being a legal entity, the partner cannot be both plaintiff and defendant, and that, if he sues the firm, he is suing himself; but that objection has been removed in cases of promissory notes and the like, to which I have referred, and there seems no good reason why it should bar an action founded upon a claim such as the present.

This case is not to be likened to the case of a joint covenant, in which one of the covenantors is also a covenantee, as in the case of *Ellis v. Kerr*, [1910] 1 Ch. 529, wherein it appears to have been held by Warrington, J., that no relief could be given because the covenant was a void covenant, and no debt or liability was created by it capable of enforcement in that action. The action failed because there was no covenant to sue upon, and not because of the form of the action.

Nor, with great respect, do I think the case can be likened to the case of a partner injured through the negligence of a servant of the partnership while actually engaged by the partner to render him a service which it was the servant's duty to render to him, and which he had a right to require the servant to render him at the time. Here the service Dowson was rendering was not a service rendered to the plaintiff as a duty owing to him because of his position as a partner. He was giving the service as the employee and servant of the firm in the course of its business. It was part of the firm's business to render these services to the plaintiff in the same way and not otherwise than they would be rendered to any other person who sought and paid for them. The firm was dealing with the plaintiff in the same way and on the same terms as its other customers. The plaintiff's loss arose in the course of the business, and not in the course of any service that he was individually receiving because he was a member of the firm. And there is no authority for saying that for such a loss he should not be recouped by the firm, just as others would be.

The negligent acts of the firm's servant in such a case ought not to be so attributed to the plaintiff as to preclude him from

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saying to the firm that the loss resulting to him was the outcome of its servant's negligence and that it should make good the consequences.

Probably this is only another manner of enforcing contribution; but, if so, there seems to be no reasonable objection to it on that ground.

Why should the fact that the loss is the loss of the plaintiff's own property place him in any different or worse position? He is out of pocket to the same extent as if he had paid it or made it good to a third person. His position ought not to be any worse than if that was what he had been obliged to do.

If, therefore, the case is to be determined upon the findings of the jury as they now stand, I would, with respect, be of the opinion that the judgment ought not to be disturbed.

But, having regard to the evidence in support of the allegation that the fire arose from or was caused by the engine, and the more than hesitation expressed by the jury in regard to their finding in the affirmative upon the second question, and to what then took place with regard to it, I would be in favour of a new trial.

The second question was the crucial question upon which, as the learned trial Judge told the jury, the whole case turned—if they answered it in the negative, they need not proceed further. It was as follows: "Were the barn and goods of the plaintiff burned by fire caused by sparks from the engine owned by the members of the syndicate?" Their first answer to this was, "We could not say definitely by the evidence produced, but we believe they were."

After some discussion between the Judge, counsel, and jury, the latter retired, and, after some time, returned, having amended their answer so as to make it state, "We believe they were." Whereupon the following took place:—

"His Lordship: Gentlemen, the answer to this second question is in rather an unsatisfactory shape. The question is, does the evidence convince your judgment that it was? Because, as I told you in the beginning, it is the duty of every plaintiff to substantiate his case by proof; and, unless the proof convinces your judgment, there is no reason why the existing state of affairs



should be changed, that is, why the defendants' money should not remain in their own pockets. You say here, you believe they were. Your previous answer, which you have struck out, is, you could not say definitely by the evidence produced. Do you make your finding as a fact that they were?

"The foreman: Your Lordship, there is a part of them that is unanimous to say 'yes,' and part unanimous to say, 'no,' and we cannot get ten to say either. We might go back and sit until morning.

"His Lordship: If you differ, that is another matter. You say, 'we believe they were.' Do you all come to that conclusion?

"A jurymen: We could come to the conclusion they were.

"His Lordship: Do you believe it from the evidence, does the evidence convince your judgment?

"A jurymen: For my part I did not. I cannot speak for the rest.

"His Lordship: That is just the trouble. I am afraid it is only prolonging the matter. You say there are not ten of you who agree either one way or the other?

"The foreman: No.

"His Lordship: Do you all say that you believe that the engine set fire to the barn?

"The foreman: Yes, that is in our own minds. We are not taking that from the evidence produced in the court-room—at least, I am speaking for myself.

"His Lordship: Well, if you tell me that it is not from the evidence you have that belief, then I think I had better not receive this answer.

"Mr. Holland: It is from the evidence, of course, that they have got to get it from.

"Mr. Armstrong: It is all circumstantial.

"His Lordship: Upon the evidence you have to decide; and, unless the evidence convinces your judgment, of course you should not render a verdict. You are not asked to believe what you hear outside, but only upon the evidence.

"A jurymen: I don't like to speak for the rest of the jury, but for my part I couldn't get from the evidence that made me think the barn was set on fire. I would not like to say 'yes' to

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that question, being under oath. Unless I have forgotten some of the evidence, they didn't give any evidence to that effect.

"His Lordship: There are not ten at all events that are agreed upon either side?

"The foreman: No; about half and half.

"His Lordship: To say either 'yes' or 'no?' Now, do you think that if you went back and considered it you might not be able to agree?

"The foreman: I don't know about that. There are eleven here besides myself, and ten make the ruling number, I understand.

"His Lordship: Yes.

"The foreman: If ten rule, I am willing to go back.

"A jurymen: I don't think it could be arranged.

"His Lordship: Supposing you try.

"A jurymen: It was the evidence guided me. I couldn't gather there was any evidence given definitely.

"His Lordship: It is only upon the evidence that you should be guided. As I told you, you would be entitled to draw inferences from the evidence.

"A jurymen: That is what guided me. I paid particular attention, and there was no evidence that said definitely what caused that fire. I couldn't get up and say 'yes' or 'no.'

"His Lordship: As I told you, you are entitled to draw reasonable inferences from the evidence, such inferences as your judgment leads you to draw. That does not mean, of course, that you are to guess at it, or anything of that sort, or be guided by anything but the evidence. Perhaps, gentlemen, if you talk it over——

"A jurymen: We have talked it over and cannot get to any other conclusion.

"His Lordship: Then you had better put down exactly what you mean by, 'you believe they were.' Say whether it is from the evidence.

"A jurymen: The question was asked. We had the questions quite plain.

"Mr. Holland: They cannot agree upon it.

"His Lordship: I will give them another chance.

"Mr. Holland: Judging by the expressions they have given, they cannot agree, they are equally divided."

The jury again retired, and, after some time, returned with the answer "yes" to the question.

An affirmative answer rendered under such circumstances cannot be said to be satisfactory.

Looking at the evidence itself and the opinions expressed by the foreman and others of the jury, and noting their very evident hesitation and reluctance to accept it as justifying them in returning an affirmative answer, I think the defendants are entitled to the opinion of another jury upon this most material part of the case; and, looking also at the nature of some of the other questions and answers, there should, I think, be a new trial generally if the defendants desire it. In the event of the defendants desiring a new trial, the costs of the former trial and the appeal should be costs in the action. In the event of the defendants not seeking a new trial, the appeal should be dismissed; but, under all the circumstances, the parties should bear their own costs of the appeal.

MACLAREN, J.A.:—I agree.

GARROW, J.A. (dissenting):—Appeal by the defendants from the judgment at the trial before Magee, J., and a jury, in favour of the plaintiff.

The plaintiff and defendants were the owners of a threshing machine outfit purchased and used by them for the purpose of doing their own threshing and also to do threshing for others for hire. On the 2nd October, 1908, the plaintiff's barn and other property were destroyed by fire caused by sparks which, it is alleged and has been found, escaped from the engine while engaged in threshing for him. And the action is brought to recover the damages thus caused.

The case is reported in 20 O.L.R. 559.

The plaintiff and the defendants, apparently at the instance of the manufacturers, the J. I. Case Company, signed an order for the threshing outfit by which they engaged to take and pay for one share each, of the value of \$100. The outfit having been procured, they held, in the month of August, 1907, what in the

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minutes is called an organisation meeting, at which they adopted the name of "The Pioneer Threshing Syndicate of Clark Township," elected a president, treasurer, secretary, and a board of directors, fixed a tariff of charges, and adopted certain printed rules, supplied by the J. I. Case Company, for the government of the affairs of the syndicate. Among other things, these printed rules provide that "the manager is to handle, care for, and have charge of the machine under the direction of the board of directors." "The board of directors shall have general charge of the machine and full power to act as to its management." "In cases where the action of the board of directors is not satisfactory to the majority of the shareholders, the matter in dispute can be adjusted at a special meeting of the company, and must be decided by a vote of the shareholders, who will be entitled to the same number of votes as they own shares, and the total number of shares in this company shall be twenty-seven." "Threshing for the shareholders must be paid for at the same rate as those charged outside the company."

In the following year, new officers were elected, the rules providing for an annual meeting. At a subsequent meeting, at which the plaintiff was apparently present, called "to hear the report of the executive *re* the employment of men to operate the engine and separator for the coming season," the secretary presented a report recommending the employment of J. T. Dowson as engineer. An amendment was moved by the plaintiff to employ John Moffatt, instead of J. T. Dowson. The matter was apparently not concluded at the meeting; but, as appears in the evidence, the management, failing to obtain the services of Mr. Moffatt, finally employed Mr. Dowson, and the latter was in charge of the engine at the time of the fire.

As will be seen by the report in 20 O.L.R., the jury found, among other things, that the sparks escaped owing to the defective condition of the engine, but they were unable to say whether such condition arose after the purchase of the engine by the syndicate. They also found that its defective condition at the time of the fire was owing to the negligence of Dowson.

They absolved the president, secretary, and the directors from any duty or liability to see to the condition of the engine,

beyond placing a competent man in charge, and attending to any repairs he might report to them as necessary. It was admitted that Dowson was a competent man.

Magee, J., in his considered judgment delivered after the trial, apparently bases the result in favour of the plaintiff upon a breach by the common servant Dowson of an implied agreement to take reasonable care, and seems to have been inclined to put it very much upon the same footing as if the plaintiff had not been a member. Led, quite naturally, by sympathy for the plaintiff in his severe loss, one is, I find, apt to look at first with favour upon that view; but it is not, I think, one which will stand sober second thought. The plaintiff proposes to transfer his loss to the shoulders of his farmer neighbours, who personally are quite as innocent as himself (assuming the negligence of Dowson); and this can only be done upon some recognised legal principle, which, after much consideration, I have been wholly unable to find.

The case differs entirely from that of a loss occurring under similar circumstances to a non-member. The non-member farmer would be undoubtedly entitled to have his work done with reasonable care and safety; and, if not so done, and damage resulted, the liability of the syndicate would be clear. But here the plaintiff, when he gave the order, expected and intended that the syndicate machine would be used. He also knew as much, or, it may be, as little, about its then condition as to safety, as did the others. The case seems, therefore, to be very much like that of a man suffering injury by the use of his own machine, under the management of his own servant. The servant, if negligent, may be liable; but I quite fail to see how, under the circumstances, a co-owner or co-partnership legally can be. If Brown and Jones are partners in the business of farming, and Brown takes the partnership waggon and horses and the partnership hired man to drive him out to market, and the hired man drives so negligently that the waggon is overturned and Brown's leg broken, it would be strange if he could maintain an action at law against Jones to compel him to bear a share of Brown's loss. And that seems to me to be this case in a somewhat simpler form, the difference, however, only consist-

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ing in that in that case there are two partners, while here there are twenty-seven. The partners, however numerous, do not in law acquire that quality of a separate entity which seems to be essential to enable one partner to sue the firm, as a shareholder may undoubtedly sue his company. Such a liability must rest either upon contract, express or implied, or upon a breach of duty. The latter is out of the question, upon the facts, as to the rank and file, and, upon the answer to the 10th question, also as far as the officers are concerned. There is certainly no express contract, and there are no circumstances shewn, in my opinion, upon which an implied contract of any kind could be inferred against the defendants, either as to the fitness of the machine or the proper use of it by Dowson.

I have looked at the cases referred to by my brother Magee and also at others, but they do not, it seems to me, help. They do not, indeed, touch the real question of difficulty, namely, that of the liability of the partnership, but deal rather with the minor question of the right to sue for an admitted liability.

So far, I have assumed Dowson's negligence. He was, it is true, employed as engineer, and had charge. He did not, however, select the engine, nor was he even the first to operate it. His duty, so far as appears, was simply to manage it with reasonable care and to keep it in proper repair. The defect, if any, was not in his mode of operation, but in the machine itself, and the only negligence which could with any show of reason be attributed to him was in using it after he knew that for some cause it permitted sparks to escape. Unfortunately, no reliable expert evidence was called to say whether it is possible to construct an engine which will emit no sparks or whether this particular engine emitted more or less than other engines of the same kind, or even to shew what Dowson should have done that he did not do to prevent the escape of sparks. It is true that one witness, Mr. Moffatt, a thresher, but scarcely an expert, says that there should be no sparks in a properly constructed engine—a statement which I am inclined to doubt, not of course from my own knowledge, but from experience gained in other cases. Another witness, Mr. Leigh, a machinist, and therefore something more of an expert, tells of what he did after the fire to

remedy as far as he could the escape of sparks. He says he saw the engine shortly before the fire and casually examined the pipe and found it very open at the top, and the joint not properly fitted; that Dowson had tried to wire it down, and consequently did the best he could in the matter under the circumstances, but did not make it so that it would hold sparks. After the fire, he again saw the engine, which was brought to him for repairs. He then, on more thoroughly examining it, found the screen-ring considerably warped. He also found the top of the pipe, on which the screen-ring should fit closely, uneven, either intentionally or unintentionally so left by the manufacturer, for it was not the result of use. This unevenness he ground down, and with a new screen-ring and screen made a close joint of it. Even with an unwarped screen-ring, this unevenness of surface, he said, would create irregular spaces in the joint of about a quarter of an inch wide, through which, of course, sparks might escape. This circumstance doubtless explains the difficulty which the jury evidently had, judging by their answer to the 4th question, in fastening the blame for the condition of the engine on Dowson. At most, he could only have been responsible for the warping if it occurred in his time, and if he was or should have been aware of it, of which there is apparently no evidence, and certainly no finding by the jury. What he did know apparently (for he was not himself called as a witness) was that, for some reason, the joint was not close. At Tamblyn's threshing, the secretary, Mr. Powers, was present, and a conversation took place between him and Dowson about it, and Powers told him to go ahead and fix it or have it fixed and put in as safe a condition as it could be. And it was on this occasion that the wiring to which the witness Leigh refers as the best Dowson could do in the matter was done.

Tamblyn, himself a member of the syndicate, supplied the wire, and after the wiring was done the threshing proceeded, all parties apparently satisfied that the danger, if any, had been thereby overcome. This occurred some weeks before the plaintiff's fire.

It is, as it turns out, a pity that Dowson's evidence was not obtained by one side or the other. We should then have had

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both sides, while as it is we only have one. The burden of proof was, of course, upon the plaintiff. The defendants exercised a perfectly legitimate right in declining, as they did, to call any evidence. A scintilla of evidence is not enough. There must be evidence from which the jury may, acting reasonably, draw the necessary inference. The jury state that they found themselves unable to say, in answer to question 4, when the defective condition arose, the reason for which I have before pointed out. The answer to the 6th question seems, therefore, somewhat inconsistent, and its meaning even a little obscure, particularly as they were not asked, as is, I think, usual, to specify the particular negligence which they found.

Upon the whole, it appears to me that, under all the circumstances, there is no reasonable warrant in the evidence to justify a finding that the plaintiff's damage was due to any negligence on the part of Dowson.

For these reasons, but chiefly for the first, I think the appeal should be allowed and the action dismissed. But, under the circumstances, which are of very great hardship upon the plaintiff, I think the defendants may well be left to bear their own costs of the action and of this appeal.

*New trial ordered, if the defendants desire it; if not, appeal dismissed; GARROW, J.A., dissenting.*

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[DIVISIONAL COURT.]

CONNORS v. REID.

D. C.  
1911  
Nov. 9.

*Malicious Prosecution—Reasonable and Probable Cause—Belief of Defendant in Truth of Charge Laid—Question for Jury—New Trial.*

In an action for malicious prosecution, the belief of the defendant in the truth of the charge which he laid is a fact material to be considered in determining whether there was reasonable and probable cause for the prosecution; the state of the defendant's mind is a fact; and where the evidence, whether of one or more witnesses (including the defendant himself or otherwise), may lead to different conclusions as to his belief, it is not for the Judge but for the jury to say what the fact is. And, in this action, the question whether the defendant honestly believed in the truth of the charge which he laid against the plaintiff was, in the circumstances, which suggested want of such belief by the defendant, for the jury.

*Ford v. Canadian Express Co.* (1910-11), 21 O.L.R. 585, 24 O.L.R. 462, and *Longdon v. Bilsky* (1910), 22 O.L.R. 4, explained.

Judgment of the Judge of the County Court of the County of Ontario, in favour of the plaintiff, set aside, and a new trial ordered, the question of the defendant's belief not having been left to the jury.



APPEAL by the defendant from the judgment of the Judge of the County Court of the County of Ontario, in favour of the plaintiff, in an action for malicious prosecution, tried with a jury.

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October 10. The appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., TEETZEL and RIDDELL, JJ.

*H. E. Rose*, K.C., for the defendant. The learned trial Judge erred in confounding malice with reasonable and probable cause, and seemed to think that, if malice were clearly proved, proof of reasonable and probable cause might be dispensed with. There should have been a nonsuit. He referred to *Longdon v. Bilsky* (1910), 22 O.L.R. 4, *per* Middleton, J., at p. 13, and *Hêtu v. Dixville Butter and Cheese Association* (1908), 40 S.C.R. 128.

*J. M. Ferguson*, for the plaintiff, argued that the facts from which the trial Judge drew the inference of reasonable and probable cause were uncontradicted, and that, even if that were not the case, the question had been left to the jury. He referred to *Longdon v. Bilsky*, *supra*, and to *Ford v. Canadian Express Co.* (1910-11), 21 O.L.R. 585, 3 O.W.N. 9 (now reported, 24 O.L.R. 462.)

November 9. RIDDELL, J.:—This is an appeal from the judgment in favour of the plaintiff in the County Court of the County of Ontario.

The action is for malicious prosecution, the defendant having charged the plaintiff, who was in his employ, with stealing milk from him. His story is that Mrs. Connors, the plaintiff, had been milking for him night and morning, that one Smith had told him that the plaintiff was stealing milk from him and that he (Smith) had seen her do this many times. He also says that one White told him that he (White) had seen her stripping the cows after she had got through milking them and taking the pail away, although he (White) could not say what she had done with it—"he (White) said something about her having a bottle under her coat, which he used to see her fill near the feed-box."

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The defendant says that he consulted a solicitor and told him what he had been informed by Smith and White; and that he was advised that it was a case for summons. The solicitor, when called as a witness at the trial, corroborates the interview and advice.

Were there no more in the case, it would be plain that there was no absence of reasonable and probable cause. But it also appears that the solicitor was consulted as early as November, since on the 25th November, 1910, he wrote the solicitor for the plaintiff's husband (who was making a claim against the defendant for her wages): "Milk was taken almost daily by Mrs. Connors, and which she has never paid for: now this may be put down to stealing, or it may be that she intends to pay for it—if the latter, would be very glad to hear of it, and if the former, we would be very sorry for her; but there is one thing sure, that we have absolute proof of what I am saying. If your client is satisfied, without prejudice, to accept \$5, my client is ready to pay it, and he does not hope to have anything more to do with Mrs. Connors."

On the 2nd December, 1910, the same solicitor writes the plaintiff and her husband offering \$5 in full of all claims, and adds: "All I can say is that Mr. Reid has two witnesses who will swear that they saw you take milk, not once but many times, and if there is any more trouble or Mr. Reid is annoyed any more he will see what he can do and will have these witnesses summoned to Court as well as Mrs. Connors." Again, on the 12th December, the same solicitor writes the solicitor for the plaintiff and her husband: "I note what you say in your letter about accepting the \$5 we have offered it to your clients in settlement of the account. We will defend any action that you bring. I might just add that if Mr. Reid has any more trouble, then other proceedings will be taken, but he is not looking for trouble unless he is forced to do it. I might just add that I have two witnesses who will prove the contention that I raised in a former letter. There is no doubt in my mind of the fact that Mrs. Connors took milk that she was not entitled to, and if she wants the matter tested, then all she has to do is to proceed."

The offer of \$5 was not accepted, and the plaintiff sued in the Division Court or proceeded before the magistrate for her

wages, and recovered the full amount she was claiming. The trial was had on the 18th January; and in the meantime, on the 16th January, the defendant laid an information before a magistrate charging the plaintiff with stealing a quantity of milk from him in August. A summons was served upon the plaintiff after the termination of the wages-proceedings in her favour. She was acquitted.

The only explanation the defendant gives of his delay in laying an information is, "I couldn't make out any account for to tell what amount of milk she stole or anything of this kind"—which, of course, is no explanation at all.

Much complaint is made that the learned County Court Judge characterised the letters already referred to as "black-mail." If they were not intended to indicate that the defendant did not believe that the plaintiff had stolen the milk, but had taken it away intending to pay for it, and without *animus furandi*, then they were an offer to compound a crime. And the whole conduct of the defendant in delaying to lay an information and in omitting to make any inquiry, etc., is indicative of his disbelief in the truth of the charge he laid.

All this is by no means conclusive against him—notwithstanding the circumstances already detailed and others, the defendant may have honestly believed that the plaintiff had stolen from him. The belief of the informant in the truth of the charge contained in the information is a most material fact in the consideration of the question of reasonable and probable cause—if the informant does not believe in the truth of the charge he is making, there is no reasonable and probable cause for him.

So far as I am concerned, I should not have thought it necessary to reserve the motion had it not appeared that two recent judgments in our Courts had been misunderstood: it seems to have been thought that if there be no contradiction in the evidence—in the sense that one witness is not called to contradict another—it is wholly for the trial Judge to draw the inferences of fact upon which to base his finding as to reasonable and probable cause. Such is, I think, not the law.

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The cases referred to are *Longdon v. Bilsky*, 22 O.L.R. 4, the judgment of Mr. Justice Middleton, pp. 8 *sqq.* and *Ford v. Canadian Express Co.*, 21 O.L.R. 585; *S.C.*, in the Court of Appeal, 3 O.W.N. 9.\*

In the latter case Mr. Justice Garrow says: "The duty of determining . . . the question of reasonable and probable cause, where the evidence is not conflicting, falls upon the Judge alone, and not upon the jury." But this does not mean that where the objective facts sworn to are not contradicted, but these facts themselves may lead to different conclusions also of fact, the Judge is to draw the conclusion of fact. Of course, if no jury could reasonably draw any but one conclusion of fact from the objective facts admitted or proved, the Judge may and should draw that conclusion himself; but where more than one conclusion of fact may reasonably be drawn from such facts, it is for the jury to say which is the proper conclusion.

In *Longdon v. Bilsky*, my brother Middleton, in an elaborate and carefully prepared judgment, considers the question whether the advice of counsel constitutes reasonable and probable cause, and on p. 14 he uses the following language: "The learned Chief Justice was only discharging his judicial function when, in the absence of any contradictory evidence, he found that there was reasonable and probable cause." But this statement must be read in connection with the facts of the case, and it does not and was not intended to apply to a case where, from the evidence adduced, either of two contradictory conclusions of fact could be drawn.

It is needless to multiply authorities; the law is clear that the belief of the defendant in the truth of the charge he was laying is a fact most material to be considered—that the state of his mind is as much a fact as the state of his digestion; and that, where the evidence, be it of one or of more witnesses (including the defendant himself or otherwise), may lead to different conclusions as to his belief, it is not for the Judge but for jury to say what the fact is.

We may regret that the law is so—I for my part do regret it—but that this is the law is, I think, plain.

\*Now reported, 24 O.L.R. 462.

I find it impossible from the notes before us to make out whether the trial Judge himself decided against the defendant upon the question of his belief—but, in any case, it was not left to the jury, as it should have been.

There should be a new trial; costs of the last trial and of the appeal to be in the cause.

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TEETZEL, J.:—I agree.

MEREDITH, C.J.:—I agree with my brother Riddell that on the facts of this case the question whether the appellant honestly believed in the truth of the charge which he laid against the respondent was for the jury.

That, where there are facts or circumstances which suggest want of belief by the defendant in the truth of the charge which he laid, the question is for the jury, was the opinion of the Divisional Court in *Ford v. Canadian Express Co.*, 21 O.L.R. 585; and there is nothing in the reported opinions of the Judges who wrote opinions when judgment was delivered by the Court of Appeal (3 O.W.N. 9) which is opposed to that view.

*New trial ordered.*

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1911

April 11

C. A.

1911

Nov. 15.

[IN THE COURT OF APPEAL.]

GISSING V. T. EATON CO.

*Release—Action for Damages for Personal Injuries—Acceptance, before Action, of Sum of Money in Settlement of Claim for Injuries—Bar to Action—Absence of Fraud—Inadequacy—Improvidence—Advantage not Taken of Inequality or Incapacity.*

The plaintiffs, husband and wife, sued for damages arising from an injury to the wife in the defendants' store, which, as she alleged, was caused by the negligence of the defendants or their servants. Before action, the plaintiffs made a settlement of their claim against the defendants with the defendants' claims agent, and were paid by the defendants the sum of \$50, and signed a receipt "in full of all claim re injuries." When this settlement was made, the wife was in bed, and was said to be still suffering from her injuries. The defendants set this up as a release of the cause of action, and the plaintiffs replied that the execution of the pretended release was procured by misrepresentation and was executed without independent advice and without knowledge of its nature and effect. The action came on for trial before a Judge and jury. The issue as to the release was tried by the Judge alone and determined in favour of the defendants. The claim for damages based on the defendants' negligence was then submitted to the jury, and a verdict given in favour of the woman plaintiff for \$750:—

*Held*, upon the evidence, reversing the judgments of the trial Judge and a Divisional Court, that the settlement had not been brought about by intimidation or fraud or by imposition of any kind; and the release was a bar to the action.

*Per GARROW, J.A.*:—There was nothing to shew that the wife was so ill as to be unable understandingly to accept or reject the offer of \$50 made by the defendants. If the settlement was improvident, or the consideration inadequate, that alone was not sufficient to justify setting aside the settlement—the inadequacy not being so gross as to prove fraud or imposition. If there was inequality or incapacity of some kind, it did not appear that advantage was taken of the circumstance.

*Per MEEDITH, J.A.*:—There is no evidence of fraud in a claims agent dealing with a married woman, who has made a claim, even if she be in ill-health, and even if she has not a husband to help her.

THIS action was brought by Alice Gissing and Albert A. Gissing, her husband, against the T. Eaton Company Limited, a company carrying on a departmental store business in the city of Toronto, to recover damages occasioned by an injury to the plaintiff Alice Gissing in the defendants' store.

The plaintiffs, by their statement of claim, alleged as follows:—

(2) On or about the 15th November, 1909, the plaintiff Alice Gissing was lawfully upon the premises of the defendants for the purpose of making purchases.

(3) On the occasion mentioned, the said plaintiff was standing in a section of the defendants' store where large rolls of oil-

cloth are exhibited for sale; and, while she was waiting to be attended to by one of the defendants' servants, the said rolls of oil-cloth, which had been placed in large numbers standing on end, toppled over, and, falling upon the said plaintiff, caused her serious personal injuries.

(4) The said injuries were caused by the negligence of the defendants as hereinafter set out.

(5) The defendants were negligent in that they placed large rolls of oil-cloth, of many feet in length, on end in such a way that, upon one roll falling or being disturbed, it might cause the whole row to topple over, as happened in this instance; and the defendants were further negligent in that, having so placed the said rolls of oil-cloth, they failed to take any precautions to prevent customers from approaching so near to the oil-cloth that they might be injured in case any of the rolls did fall.

(6) By reason of the premises, the plaintiff Alice Gissing suffered great pain and injury to her health, and is permanently injured and incapacitated from attending to her duties; and the plaintiff Albert A. Gissing was deprived of and will lose the comfort, assistance, and services of his wife, and has incurred and will incur expense for nursing and medical and other attendance of his wife.

The defendants, by their statement of defence, alleged as follows:—

(2) If the plaintiff Alice Gissing suffered any injury, as alleged, such injury was caused by her own negligence, and not the negligence of the defendants.

(3) The negligence of the plaintiff Alice Gissing so contributed to the happening of the accident, if any, of which the plaintiffs complain, that but for such negligence the said accident would not have happened.

(4) If the plaintiffs ever had any right of action against the defendants by reason of the matters alleged in the statement of claim, which the defendants deny, the plaintiffs, in consideration of \$50 paid by the defendants to them, released such right of action to the defendants. The said release is evidence by a writing, duly signed by the plaintiffs, in the words and figures following: "Dec. 15, 1909. Received from the T. Eaton Co.

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Limited the sum of fifty dollars (\$50.00), in full of all claim re injuries said to have arisen out of fall on floor, while in their linoleum section on November 15th, 1909. Alice Gissing. Albert A. Gissing."

In reply, the defendants alleged that the execution of the release referred to in the statement of defence was procured by the misrepresentation of the defendants' physicians; that the document was executed by the plaintiffs on the representations of the said physicians that the injuries complained of were of a trifling nature, whereas they proved to be of a serious and permanent nature; and that the document was executed by the plaintiff Alice Gissing without independent advice and without knowledge of its nature and effect.

The action came on for trial before TEETZEL, J., and a jury, at Toronto, on the 30th January, 1911.

The issue raised as to the validity of the release was first tried by the learned Judge without the jury, and was determined by him in favour of the plaintiffs.

The issue as to the defendants' liability for the injury to the plaintiff Alice Gissing was then tried before the Judge and jury. The jury found a verdict for the plaintiff Alice Gissing, and assessed her damages at \$750.

The judgment entered was as follows:—

1. This Court doth declare that the settlement and receipt set up by the defendants in bar of the plaintiffs' claims are null and void in so far as concerns the plaintiff Alice Gissing, and doth order and adjudge the same accordingly.

2. And this Court doth further order and adjudge that this action be and the same is hereby dismissed as to the claim of the plaintiff Albert A. Gissing.

3. And this Court doth further order and adjudge that the plaintiff Albert A. Gissing do pay to the defendants the extra costs of this action occasioned by the said Albert A. Gissing having been made a party plaintiff, forthwith after taxation thereof.



4. And this Court doth further order and adjudge that the plaintiff Alice Gissing do recover from the defendants the sum of \$750 and her costs of this action, forthwith after taxation thereof.

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The defendants appealed from the judgment of TEETZEL, J.

April 10 and 11. The appeal was heard by a Divisional Court composed of BOYD, C., LATCHFORD and MIDDLETON, JJ.

*I. F. Hellmuth*, K.C., and *G. W. Mason*, for the defendants.  
*T. N. Phelan*, for the plaintiffs.

April 11. BOYD, C.:—Two of the members of the Court agree that the appeal should be dismissed. My brother Middleton dissents. There has been a double trial, first on the question of the release by the learned trial Judge, and then by the jury on the question of injuries to the plaintiff and damages. The learned trial Judge decided that the alleged settlement did not furnish an answer to the plaintiffs' claim. The verdict for \$750 shews the estimate which the twelve men composing the jury placed upon the plaintiff's injuries. It is true that in the beginning Mrs. Gissing was willing to release the Eaton company from all liability on payment to her of \$200; and, if that demand had been acceded to, it might have been a fair settlement, and this case would never have been here. But \$50 was grossly inadequate, and was not commensurate with the injuries sustained by the plaintiff. The woman suffered a serious injury, and is entitled to substantial damages. It cannot be said that the parties were dealing on equal terms. The woman was in bed; her leg was benumbed; she had that day suffered from a fainting spell, caused by the pain from her injury; she was worried about the health of her husband, who was suffering from heart failure, and who was in a state of trepidation.

Black, the claims agent of the defendants, who negotiated with her, was an astute alert man, who thoroughly understood the business in hand and its consequences. The learned trial Judge credits what the woman says of the matter. He also says in his judgment: "Black had alleged that they were pre-

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pared to prove by witnesses that she had not got hurt in the way she claimed at all, which, together with the fact that she had lost or forgotten the address of the only witness whom she had in mind to prove her case, would be circumstances which, in her then condition, would probable unduly influence her in accepting any proposed compromise."

Looking at all the circumstances, I am not able to say that the judgment should be disturbed. The appeal should be dismissed with costs.

LATCHFORD, J.:—I agree.

MIDDLETON, J.:—I cannot agree with the majority of the Court, and I think the appeal should be allowed. I need not recapitulate what my Lord the Chancellor has said about the facts. I think the case comes clearly within *North British R.W. Co. v. Wood* (1891), 18 Ct. of Sess. Cas. (4th series) 27. The Court ought to enforce the contract of release. There was not, in my view, upon the plaintiff's own evidence and that of her husband, any fraud or overreaching.

*Appeal dismissed with costs; MIDDLETON, J., dissenting.*

The defendants appealed to the Court of Appeal from the order of the Divisional Court.

September 29. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

*I. F. Hellmuth*, K.C., and *G. W. Mason*, for the defendants. Although our reasons of appeal cover the whole case, we confine our argument in the appeal to the question of a release, and we submit that the settlement made with the defendants is absolutely binding upon the plaintiffs. It was made deliberately, and with full knowledge of all the facts; and it was not compassed by any intimidation or fraud. Mere inadequacy of consideration is not sufficient reason to nullify an agreement to settle. The case of *North British R.W. Co. v. Wood*, 18 Ct. of Sess. Cas. (4th series) 27, cited by Middleton, J., in his dissenting judgment in the Divisional Court, is still, we submit, good law.

*T. N. Phelan*, for the plaintiff Alice Gissing, the respondent. The means by which this release was obtained from the plaintiffs were so unfair that the settlement should not be allowed to stand. The document is not a release, but a receipt, which is merely evidence of an agreement. The learned trial Judge applied to this case the observations of the learned Chancellor in the case of *Doyle v. Diamond Flint Glass Co.* (1904), 8 O.L.R. 499, 502: "It is not the ordinary case of the compromise of a doubtful claim, but one in which the parties were not dealing on equal terms and in which the woman's competency for such business admits of the gravest doubt." Under the circumstances, where the parties are not on equal terms, and where there is evidence of overmatching or misstatement, as there undoubtedly was here, the Court ought to infer that the receipt was obtained by such unfair means that it would be improper to set it up as a defence, and the Court in maintaining it would be countenancing a fraud: *Doyle v. Diamond Flint Glass Co.*, *supra*, and in appeal (1905), 10 O.L.R. 567; *Johnson v. Grand Trunk R.W. Co.* (1893-4), 25 O.R. 64, 69, 21 A.R. 408, 413; *Begg v. Toronto R.W. Co.* (1904-5), 3 O.W.R. 517, 520, 6 O.W.R. 239, 241; *Smith v. McIntosh* (1906), 13 O.L.R. 118; *Ellen v. Great Northern R.W. Co.* (1901), 17 Times L.R. 453; *Hirschfeld v. London Brighton and South Coast R.W. Co.* (1876), 2 Q.B.D. 1. The case of *North British R.W. Co. v. Woods*, relied on by the appellants, does not apply here, the findings of fact being entirely different from those in the present case.

*Hellmuth*, in reply.

November 15. GARROW, J.A.:—Appeal by the defendants from the judgment of a Divisional Court affirming the judgment at the trial before Teetzel, J., and a jury, in favour of the plaintiff Alice Gissing.

The action was brought to recover damages said to have been caused to her by a roll of linoleum falling upon her in the defendants' wareroom.

Among other defences, the defendants pleaded a settlement and release in consideration of the sum of \$50. The issue as to it was tried without the jury and found in favour of the

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plaintiff. The case thereupon proceeded, and the jury found upon the other issues in favour of the plaintiff, and assessed the damages at \$750.

Teetzel, J., in rendering judgment upon the issue as to the release, said that the plaintiff, while in the witness-box, appeared to be a fairly alert woman but of little education. She was not, when the release was executed, in a condition fairly and reasonably to transact such important business, with a certainty that she understood and appreciated what she was doing. The sum was grossly inadequate. Black, the defendants' agent, made the statement that it would be proved by witnesses that she did not get hurt as she alleged, and she had lost the address of the only witness she had, which probably unduly influenced her in accepting the proposed compromise. And wound up his judgment as follows:—

“I am of the opinion that the case turns, not only upon the fact of her condition at the time being such that she was not upon an equal footing with the defendants' representative to deal with this case, but also upon the fact that this settlement was so grossly inadequate as to justify the inference that this woman was either intimidated by the defendants' agent, or that fraud entered into the transaction, so far as he was concerned. Ordinarily, inadequacy of consideration is not a ground for setting aside a settlement; but, if the parties are not upon equal terms, and one of them is not in a situation to judge for himself, and accepts the satisfaction unwillingly, or unwittingly, not appreciating his full rights, and, at the same time, the inadequacy is so gross in its nature as to shock the conscience of a reasonable man, the Court, I think, in such cases, ought to infer that the accord and satisfaction, or settlement, was brought about either by intimidation or fraud; and I think this case fully warrants, at least, the inference that it was brought about by the intimidation of this woman, and that she was not in a position fully to appreciate her rights, and for that reason that it should not be allowed to stand against her. The case will, therefore, proceed to trial upon the other issue.”

At the close of the evidence of the female plaintiff on this issue, the learned Judge had remarked to counsel for the plain-

tiffs, who was asking for leave to amend by offering to return the \$50: "The only ground for setting it aside, so far as I can see, is improvidence. There is no misrepresentation by anybody." Mr. Hellmuth (for the defendants): "Your Lordship is not ruling on the evidence?" His Lordship: "No, that is the only contention that is made." Mr. Phelan (for the plaintiffs): "That is the ground we are relying on."

In the Divisional Court the facts were again reviewed, very much in the same way, by the learned Chancellor, who delivered the judgment of the majority, and concluded that the judgment of Teetzel, J., should be affirmed.

Middleton, J., dissented, holding that the release had not been successfully attacked.

The accident was a peculiar one. The female plaintiff was among some rolls of linoleum, remnants which had been sold, and were standing in rolls ready to be sent out, in front of the larger unsold rolls. The former, for some reason, probably because some one in passing touched one of them, sending it against the others, fell; and, as she says, one of them in falling struck her in the back and forced her to her hands and knees. She was helped to a chair and subsequently taken to the rest-room, where she remained for some hours, when she went home. She wished to leave earlier, but was apparently detained by the nurse. Shortly afterwards, she called in Dr. Cuthbertson, who saw her frequently within the first two weeks, but who unfortunately was not called as a witness. So there is no evidence, except that of the female plaintiff, of the exact nature of the injury, which apparently left no distinctive outward sign.

The accident happened on the 15th November, 1909. On the 22nd November, 1909, the male plaintiff wrote a letter to the defendants, complaining that his wife had been injured "by one of the defendants' employees carelessly letting some rolls of oil-cloth fall upon her," and demanding their attention to the claim. The female plaintiff had previously sent, on two occasions, by messengers, verbal demands for attention on the part of the defendants to her case, but without effect. In reply to the letter, Mr. Black came the next day and saw the female plaintiff. He went away without making any offer, but said he would call

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again. He did not, however, do so until after the male plaintiff had gone several times to see him. He (Black) next came on the occasion when the release was signed, on the 15th December, 1909, or exactly a month after the accident. The male plaintiff had seen Black that morning, and had been told that the utmost the defendants were willing to pay was \$50. He returned home and told his wife that all the defendants would pay was \$50, and that Black was coming up at three o'clock that afternoon to close it, if she was willing to accept. Black did not come until about five o'clock, and then the money was paid, and the document, which is simply a receipt in full, was signed by both plaintiffs, and taken away by Black.

When Black came, both plaintiffs were present. Black's first remark to the female plaintiff, who was in bed, was, "Jump up out of that and I would find out I would be all right," to which she replied, "You take a chair and sit down there, and when I am able to jump around I will jump around—that is the way I spoke to him." Then they proceeded to discuss what might be called the merits. Black told her, "The men all say that it never hit you," to which the female plaintiff replied that they were telling lies, and that he was encouraging them. "Then Mr. Black jumped up with a sheet of paper and told me to sign that paper or I would never get a single cent—he would see to it." And she and her husband signed the paper and accepted the \$50.

The discussion was, she says, very warm on both sides, and, to judge from what appears in the notes of evidence, no less warm on her side than on his, taking, as I do throughout, her own story as told in the evidence. Her husband apparently took little part, although present throughout.

Led by her counsel, the female plaintiff made a faint attempt to convey the impression that she did not understand the meaning of the receipt, but Teetzel, J., intervened:—

"His Lordship: Q. Are you pretending to say now that you did not know you were signing a receipt for fifty dollars? A. I knew he said he would pay me fifty dollars.

"Q. You must take that or nothing? A. Yes, that is what he said . . .

"Q. You were not bound to take the fifty dollars, you knew that; if you thought you were entitled to more, you were not bound to take the fifty dollars, why did you take it? A. Well, because my husband drove me to sign it."

She also said that, if the fifty dollars had been two hundred dollars, the matter would have been at an end; in other words, it is plain that her real grievance is not that she did not understand the nature and effect of what she was doing, but that she settled for too little.

Under these circumstances, I feel compelled to agree with Middleton, J., in his dissenting judgment. People must not be allowed to play fast and loose with settlements made as this was, deliberately, intentionally, and with full knowledge of all the facts. Business could never be carried on in that way.

I am, with deference, quite unable to see in the evidence any justification for the statement that the settlement was brought about by intimidation or fraud or by imposition of any kind.

Black did not seek the plaintiffs, nor urge nor advise them to settle. They sought him, as the representative of the defendants having charge of the matter, and he went to the plaintiffs' residence only in pursuance of the arrangement made with the male plaintiff, at the instance of his wife, who sent him to obtain a settlement if possible. Before going, he had given to the husband his ultimatum—\$50, and not a cent more—and this was duly reported to the female plaintiff by her husband on his return. So that when, later in the day, Black came, the matter was of the very simplest, namely, to say "yes" or "no" to the offer. It had in the meantime been under discussion and consideration by the plaintiffs; and, as the female plaintiff herself admits, her husband had advised—she puts it in one place "influenced," and in another "drove"—her to accept.

The female plaintiff is, it is true, shewn to have been in bed, and she may have been ill and in pain, although it would have been more satisfactory on these points if her physician had been called or even her husband, neither of whom was examined on this issue. But, granting that her condition was as she describes, there is absolutely nothing fairly to shew that she was so ill as to be unable understandingly to accept or reject the offer, which,

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after all, is all that she was called on to do. Something might even not unreasonably, under the circumstances, be said about the alleged improvidence, or, as I would prefer to call it, inadequacy of the consideration. The claim was by no means admitted; on the contrary, it was, honestly and on quite sufficient grounds, stoutly contested. The female plaintiff was willing to accept \$200; and, in considering the question of inadequacy, that sum, and not the sum subsequently awarded by the jury, should alone, I think, be regarded. But, however that may be, improvidence or inadequacy of consideration alone is not sufficient to justify setting the settlement aside. "Mere inadequacy of consideration is not a ground even for refusing a decree for specific performance of an unexecuted contract. . . . And still less can it be a ground for rescinding an executed contract. The only exception . . . is, where the inadequacy of consideration is so gross as of itself to prove fraud or imposition on the part of the purchaser. Fraud in the purchaser is of the essence of the objection to the contract in such a case:" *Borell v. Dann* (1843), 2 Hare 440, at p. 450; see also for other illustrations, of which there are many, *Harrison v. Guest* (1855), 6 DeG. M. & G. 424; *Middleton v. Brown* (1878), 47 L.J. Ch. 411.

It must be made to appear not only that there was inequality or incapacity of some kind, but that advantage was taken of the circumstance; and, in my opinion, nothing of the sort appears in this case.

I would allow the appeal and dismiss the action, both with costs, if demanded.

MEREDITH, J.A.:—In the light of that which has developed since the settlement made between the parties, the sum which the plaintiff and her husband accepted in satisfaction of all claims in respect of the plaintiff's injuries, sustained in the defendants' stores, is much too little; but the case, as to the settlement of the claims, is not to be looked at in that after-light; it is to be viewed from the standpoint of the parties at the time when the compromise was made; and, so viewed, there is nothing startling, nothing even suspicious, in the acceptance of \$50 in satisfaction



of them. The most the plaintiff and her husband had asked was \$200; he and she, as well as the defendants' agent who effected the settlement for them, all believed that the plaintiff's injuries were of a more or less trivial character; her medical adviser was of that opinion, and had said so; there was nothing to indicate any kind of serious injury. In these circumstances, who can say that the settlement was even an unwise one? The defendants had a witness of the occurrence ready to testify, and who, at the trial, did testify, that the plaintiff was not struck by the roll of floor-cloth, but merely fell and hurt herself. The husband and wife were surely not far wrong in thinking that one-fourth of the sum they demanded was better than a law-suit, which, it might well have been thought, would be, as no doubt it was, inevitable, if the sum offered were rejected, and if the plaintiff and her husband had courage enough to sue for more; a law-suit in which the chances seemed against them, and one in which, even if they were successful to the full amount of their demand, in view of solicitor and client costs, and the mental and bodily wear and tear of it, might prove unprofitable.

I am quite unable to find even a scintilla of evidence of fraud in the transaction; there was no going behind the backs of the legal, or other, advisers of the claimants to effect a settlement—a fact not infrequently seized upon by Judges to upset a bad bargain, and one which naturally arouses some suspicion: the defendants naturally felt that they had a good defence to any action that might be brought against them, but, wisely enough, thought it better to pay \$50 than have a law-suit, with its cost and worry and possible inability to recover their costs—if successful and if awarded them. There is no evidence of fraud in a "claims agent" dealing with a married woman, who has made a claim, even if she be in ill-health, and even if she has not a husband to help her; and, with all our sympathy for the suffering, we have, I hope, hardly got so far as to hold that every bargain made by a woman in ill-health is voidable on the ground of fraud if it turn out to be a bad bargain for her, but valid if bad for the other fellow.

I cannot see how this transaction, reasonably, can be adjudged voidable on the ground of fraud. It seems to me to be

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contrary to common sense to say that any kind of fraud was perpetrated, or intended to be perpetrated, upon the plaintiff or her husband, or ever thought of by the defendants or their agent; he was too confident of the invalidity of the claims to be put to any such a shift, even if dishonest and foolish enough to attempt it, of which there is no sort of evidence. His advice to the woman to get up and go to work and not nurse an imaginary injury into real nervous trouble, was evidently sincere, and was indeed the best advice that could have been given to her if her condition had really been that which her medical adviser thought, and every one else thought, at that time.

The question whether the agreement could be set aside on the ground of mutual mistake of facts—the nature and extent of the woman's injury—has not been raised at any stage of the case, nor discussed here; and, therefore, I express no opinion upon it.

MOSS, C.J.O., MACLAREN and MAGEE, J.J.A., concurred.

*Appeal allowed and action dismissed.*

[IN THE COURT OF APPEAL.]

REX v. WOOD.

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Nov. 15.

*Criminal Law—Omitting to Provide Necessaries for Wife—Criminal Code, sec. 242(2)—Foreign Decree—Effect of—Domicile—Likelihood of Permanent Injury to Wife's Health—Evidence—Findings of Jury.*

The defendant was tried upon an indictment charging him with refusing, neglecting, and omitting, without legal excuse, to provide necessaries for his wife, whereby her health was now and was likely to be permanently injured, contrary to the Criminal Code, sec. 242(2). The defendant admitted the marriage, but alleged that he had obtained a valid decree of divorce in the State of Ohio; and he denied that the complainant's health was or was likely to be permanently injured for want of necessaries. The defendant was domiciled in Ontario at the time of the marriage; and the jury found that he had not acquired a new domicile in Ohio. The jury also found that the wife's health was likely to be permanently injured by the husband not supplying the necessaries of life. A general verdict of "guilty" was also found, and the defendant was convicted:—

*Held*, upon a case stated, that the findings and verdict were supported by the evidence; that the decree of the Ohio Court was not conclusive on the question of domicile; and, upon the finding of the jury as to domicile, had no efficacy in Ontario; and the conviction was affirmed.

*Quære, per* MEBEDITH, J.A., whether the domicile of the husband would be, in the circumstances of the case, also the domicile of the wife.

CASE stated for the opinion of the Court of Appeal by His Honour Judge Denton, one of the Junior Judges of the County Court of the County of York, as follows:—

"On the 16th May, 1911, the prisoner was tried at the General Sessions of the Peace for the County of York, on an indictment charging him "that, at the city of Toronto, in the county of York, on or about the 12th day of April, 1911, and on divers other days and times before and since that date, being then and there as her husband under legal duty and bound by law to provide sufficient food, clothing, and lodging, and all other necessaries, for Alice Wood, his wife, but in disregard of his duty in that behalf, then and there refused, neglected, and omitted, without legal excuse, to provide necessaries for her, the said Alice Wood, by means whereof the health of the said Alice Wood is now and is likely to be permanently injured, contrary to the Criminal Code."

"The verdict of the jury involved the consideration by them:—

"(1st.) Of the validity or invalidity of the decree of divorce obtained by the prisoner on the 27th June, 1910, from

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the Court of Common Pleas within and for the County of Cuyhago and State of Ohio, United States of America, purporting to dissolve the marriage between the prisoner and the said Alice Wood.

“(2nd.) The question whether, apart from the said divorce, there was any legal excuse for not supplying the necessaries.

“(3rd.) Whether the woman’s health was or was likely to be permanently injured by not being furnished with such necessaries.

“In my charge to the jury, I gave them certain instructions and directions as to the law, and asked them to find the facts based upon such instructions and directions.

“After the jury retired to consider their verdict, they asked to be furnished with the questions necessary for them to answer before reaching a verdict. These questions were furnished to the jury; and, upon these answers, which were unfavourable to the prisoner, the jury brought in a verdict of ‘guilty.’

“The prisoner’s counsel asked for a stated case on the points of law raised by him. I granted his request, admitted the prisoner to bail, and remanded him for sentence.

“The indictment, the evidence taken at the trial, the charge, the exhibits, the questions submitted to the jury and the answers thereto, are forwarded herewith and made part of this case.

“I reserved the following question for the opinion of the Court:—

“Are the findings and the verdict of the jury, based upon such instructions and directions, sufficient in law to support or warrant the conviction of the prisoner?”

October 4. The case was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

*A. R. Hassard*, for the defendant, argued that the Ohio divorce was sufficient to exempt his client from liability to provide necessaries under the section in question. The decree is conclusive on the question of domicile. It is shewn, besides, that the defendant had acquired a domicile in Ohio two years before he took steps to obtain the divorce; and the learned trial Judge should have charged the jury to that effect. He referred to

Dicey's Conflict of Laws, 2nd ed., pp. 88, 89; *Rex v. Hamilton* (1910), 22 O.L.R. 484, 486; *Bater v. Bater*, [1906] P. 209, at p. 224, where *Castrique v. Behrens* (1861), 30 L.J.Q.B. 63, is approved; *Rex v. Woods* (1903), 6 O.L.R. 41. The defendant is further exempt from liability on the ground that the Crown has not discharged the onus of shewing that the wife's life has been endangered, or that her health has been or is likely to be permanently injured by the alleged omission to provide necessaries.

*J. R. Cartwright*, K.C., for the Crown, argued that the defendant had failed to prove, as he was bound to do, that he had acquired a domicile in Ohio when the alleged divorce was obtained; and questioned whether a person in his position could be heard to say that he had acquired another domicile, referring to *Bater v. Bater*, *supra*, at p. 216. His evidence is shiftily and vacillating, and such as the jury were entitled to give little weight to. As to the question of the injury to the wife's health, while the Judge says that the evidence was not very strong, it was fairly put before the jury, who were entitled to find upon it as they had done.

*Hassard*, in reply.

November 15. MACLAREN, J.A.:—The defendant was convicted at the General Sessions of the Peace at Toronto on the 16th May, 1911, under sec. 242(2) of the Criminal Code, before the County Court Judge and a jury, of omitting, without lawful excuse, to provide necessaries for his wife, Alice Wood, whereby her health was or was likely to be permanently injured.

He admitted that he had married her at Toronto in 1903, but claimed that he had secured a valid divorce at Cleveland, Ohio, on the 27th June, 1910. He also denied that her health was or was likely to be permanently injured for want of the medical necessaries she claimed.

The learned Judge submitted to the jury the following questions, which were answered by them as follows:—

"1. Had the accused husband, when he commenced his divorce proceedings and obtained the divorce, acquired an actual, real, and permanent domicile or home in Ohio? A. No. Or did

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he go there merely for the purpose of living there long enough to enable him to obtain the divorce, and then return to Canada?  
A. Yes.

"2. If the answer to the above question be that he did not acquire such permanent domicile in Ohio, then is there any lawful excuse shewn for not supplying the necessaries to his wife, either on the ground of her having deserted him, or on the ground of his inability to supply them? A. No.

"3. Has the wife's health been permanently injured, or is it likely to be permanently injured by the husband not supplying the necessaries of life? A. The wife's health has not been permanently injured, but is likely to be permanently injured by the husband not supply the necessaries of life."

In addition, the jury brought in a general verdict of guilty.

The learned Judge had fully instructed the jury as to the law applicable to the case, in a charge which was not objected to.

At the request of the defendant's counsel, he reserved for this Court the following question; "Are the findings and the verdict of the jury, based upon such instructions and directions, sufficient in law to support or warrant the conviction of the prisoner?"

It has been for years well settled law in this country that it is the Courts of the domicile of the parties that have jurisdiction on the subject of divorce: *Rex v. Woods*, 6 O.L.R. 41; *The King v. Brinkley* (1907), 14 O.L.R. 434; *Rex v. Hamilton*, 22 O.L.R. 484; *Bater v. Bater*, [1906] P. 209.

The defendant had been domiciled in Toronto when he married his wife there in 1903. The jury have found that he had not acquired a new domicile in Ohio; and I do not see how, upon his own evidence, they could have found otherwise.

But it was argued that the certified copy of the Cleveland judgment put in at the trial is conclusive on this point.

However, an examination of the judgment shews that it contains no reference or statement as to either the domicile or residence of either of the parties. It is simply a decree of divorce of the Court of Common Pleas of the State of Ohio, in a case of "Walter M. Wood, plaintiff, v. Alice M. Wood, defendant," without saying where either the plaintiff or the de-

fendant resided or was domiciled. The judgment does not shew, nor does it appear in any way, nor was it proved at the trial here, that either domicile or residence in the State of Ohio is a prerequisite to the obtaining of a divorce in that State.

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On the other point, as to the wife's health being likely to be permanently injured by the husband not supplying her with the necessities of life, the testimony of the wife and of Dr. Tuck is sufficient to justify the verdict of the jury on this point. It was shewn that she needed to undergo a serious operation, for which she had neither the means nor the strength, so long as she was compelled to continue the menial labour she had undergone for the support of herself and their child. The evidence also shewed that she had not deserted him, but that he had deserted her.

The question reserved should be answered in the affirmative.

MEREDITH, J.A.:—If the findings of fact upon which the verdict was based are true, the conviction is right. But it was contended that the decree of the Ohio Court is conclusive on the question of domicile; and that, if not, there was no reasonable evidence to support the finding that the husband acquired no domicile in Ohio, or the finding that the wife's health was likely to be permanently injured by the husband's neglect to supply her with the necessities of life.

It may be that, upon the case reserved, in its present form, these questions are not open to the defendant here; that the only question is, whether the conviction can be sustained upon the facts as found—a question over which there could hardly be any serious controversy. On both sides, however, the case was argued as if the objections to the verdict and conviction, which I have mentioned, are open to the defendant here, as, I have no doubt, the learned Chairman of the General Sessions of the Peace meant that they should be; and so, I think, they may now be properly considered.

The first point fails, in the first place, because there is nothing, in the decree or otherwise, to shew that the question of domicile was considered in the Ohio Court, or that the jurisdiction of that Court, to pronounce such a decree, at all depended upon domicile; and, if there had been, I am far from thinking

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that such facts would have precluded the Courts of this Province from inquiry into the fact, or from dealing with the rights of the parties upon their own findings respecting it: see *Sewall v. Sewall* (1877), 122 Mass. 156.

Then, upon the defendant's own uncertain testimony, it cannot truly be said that reasonable jurors could not find, as the jury in this case very firmly found, that the husband never acquired a domicile in Ohio; in some places in his testimony he said, in effect, that he had not, though in others he may have made out a sufficient case of change of domicile; upon the whole evidence, including the material surrounding circumstances, the question was plainly one for the jury; and it would be too much even to assert that they reached a wrong conclusion.

The question whether the domicile of the husband would be, under the circumstances of the case, also the domicile of the wife, does not seem to have been considered at the trial: see *Bater v. Bater*, [1906] P. 209; *Ogden v. Ogden*, [1907] P. 107; *Briggs v. Briggs* (1880), 5 P.D. 163; *Hunt v. Hunt* (1878), 72 N.Y. 217; *Watkins v. Watkins* (1883), 135 Mass. 83; and *Town of Watertown v. Greaves* (1901), 112 Fed. Repr. 183.

So, too, in regard to the last point, there was evidence upon which reasonable jurors might find, as the jury in this case found, that the husband's neglect was likely to injure permanently the wife's health. The learned Chairman told the jury that the evidence for the prosecution was weak in this respect; but, in effect, that there was enough to put upon them the responsibility of determining the matter. I do not quite share his view of the weakness of the evidence in this respect; I would rather have thought that a pretty strong case was presented. The woman had to work very hard, for one in her state of health, for the necessaries of life for her child and his, and herself—work which, according to the only medical testimony adduced at the trial, was breaking down her health owing to organic trouble which urgently needed surgical treatment, treatment which could not be given so long as she was obliged to work. I cannot think it an answer, to all this, to suggest that she might, through charity, obtain that which it was her husband's legal duty to supply.



I would, therefore, answer the question reserved in the affirmative.

MOSS, C.J.O., GARROW and MAGEE, J.J.A., concurred.

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*Conviction affirmed.*

[IN THE COURT OF APPEAL.]

REX v. AUSTIN.

*Criminal Law—Gold and Silver Marking Act, 1908—Proportion of Gold in Article Kept for Sale—Ascertainment—Construction of sec. 11.*

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The defendant was charged with having in his possession, with intent to sell, certain rings marked "9 ct.," meaning that they were of nine karat gold, whereas that number did not bear the same proportion to twenty-four karats as the weight of the gold in the metal or alloy bore to the gross weight thereof. The article produced in evidence was described as filled signet ring, composed of a hollow metal ring, the inside being filled with wax or cement:—

*Held*, (MAGEE, J.A., dissenting), that, upon the true construction of sec. 11 of the Gold and Silver Marking Act, 7 & 8 Edw. VII. ch. 30(D.), the proportion of nine twenty-fourths gold, in the case of such an article, is to be ascertained, not by reference to the weight of the alloy of which the gold forms part, but by reference to the weight of the whole article; and there was in this case a contravention of the Act.

CASE stated for the opinion of the Court of Appeal by R. E. Kingsford, Esquire, one of the Police Magistrates for the City of Toronto, as follows:—

"The defendant was charged by the Government Inspector with a breach of the Gold and Silver Marking Act, being 7 & 8 Edw. VII. ch. 30 (D.), in that he had in his possession, with intent to sell, certain rings, to the number of seventy-two, marked '9 ct.,' meaning that the said rings were nine karats gold, which number of karats so stated did not bear the same proportion to twenty-four karats as the weight of gold in the metal or alloy bore to the gross weight thereof.

"I reserved judgment; and on the 16th May, 1911, delivered judgment acquitting the defendant; and, upon the application of the Crown, I reserved the following questions of law, arising during the trial, for the opinion of the Court of Appeal:—

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"1. Was I right in holding that the requirements of secs. 10 and 11 of the Gold and Silver Marking Act are, that articles stamped a certain number of karats need not contain that number of twenty-fourths of the total weight of the whole article of gold?

"2. Was I right in holding that the requirements of secs. 10 and 11 of the Gold and Silver Marking Act are, that articles stamped so many karats should be composed of that number of twenty-fourths gold to the weight of the gold alloy only in the article in question?

"3. Was I right in holding that filling or any substance other than gold or alloy was not part of the composition referred to in the said sections?"

Sections 10 and 11 of the Act are as follow:—

10. It shall not be lawful for a dealer to make or to sell, or to bring into Canada, any article purporting to be wholly or partially composed of gold or of any alloy of gold, if the article has applied thereto any mark indicating or purporting or intended to indicate the gold in the article to be of less than nine karats in fineness, or consisting of or including the words *Gold, Solid Gold, Pure Gold, U.S. Assay*, or other words purporting to describe the gold or alloy of which the article is composed.

11. As respects articles composed, in whole or in part, of gold or of any alloy of gold—

- (a) marks indicating the quality of gold or alloy of gold used in the construction of the article shall state the fineness of the gold in karats, thus: 12K, 18K, or as the case may be;
- (b) the number of karats so stated shall bear the same proportion to twenty-four karats as the weight of the gold in the metal or alloy bears to the gross weight thereof; that is to say, 18K shall be deemed to mean that in the composition there are eighteen parts of pure gold and six parts of other ingredients; and—
- (c) the actual fineness of the gold or alloy of gold of which the article is composed shall not be less than the said proportion—

- (i) by more than one-half of a karat, if solder is used,  
or  
(ii) by more than one-quarter of a karat, if solder is  
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September 25. The case was heard by Moss, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

*J. Jennings*, for the Minister of Justice. There should have been a conviction. The rings were wrongly marked nine karats, as the gold in the alloy which formed the outer part of the rings was only nine-twenty-fourths of the weight of such outer part, instead of nine-twenty-fourths of the weight of the whole ring, including the cement or wax which was inclosed in and formed the inner part of the ring. Section 11 of the Act is the section which applies; and, though it may be capable of the meaning given to it by the learned Police Magistrate, yet the clear intention of Parliament, namely, to protect the purchaser from fraud, is against that reading and in favour of the interpretation which I have just submitted is the correct one. The learned Police Magistrate has said that the word "thereof" in line 4 of sec. 11 (b) refers to the word "metal" or "alloy" in the preceding line. I submit that "thereof" refers to the word "article" occurring earlier in the section. I also contend that the word "composition" in line 5 of clause (b) includes the filling, although the learned Police Magistrate held that it did not. I also submit that the Act should be liberally construed, as it is for the protection of the public.

*T. C. Robinette*, K.C., for the defendant. The learned Police Magistrate was right in acquitting the defendant, and in his interpretation of the Act. The evidence shews that the defendant bought the rings, not knowing that they were filled. There was no guilty knowledge.

*Jennings*, in reply. On the question of knowledge, I point out that, even after the inspector warned the defendant, the latter continued selling the rings.

November 15. Moss, C.J.O.:—The defendant was tried before R. E. Kingsford, Esquire, a Police Magistrate for the City

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of Toronto, upon a charge of contravening the provisions of sec. 11 of the Gold and Silver Marking Act, 1908, by having in his possession, with intent to sell, certain rings marked "9 ct.," meaning that they were of nine karat gold, whereas that number did not bear the same proportion to twenty-four karats as the weight of the gold in the metal or alloy bore to the gross weight thereof.

The article produced in evidence was described as a filled signet ring, composed of a hollow metal ring, the inside being filled with wax or cement.

The gross weight was 22.500 grains; the metal weighed 10.634 grains; making the weight of the filling 11.866 grains. The metal contained gold of the weight of 4.636 grains, which, if the proportion is between the gold and the weight, without taking the filling into account, is a proportion greater than nine-twenty-fourths, and would justify the mark "9 ct." The Police Magistrate took the view that the filling was not to be taken into account, and dismissed the charge; but, at the request of the Crown, stated a case for the opinion of the Court.

The question raised is not free from difficulty. The language of sec. 11, under which the charge was laid, is by no means clear in expressing what was intended. And it is not surprising to find more than one view taken of its proper meaning and effect.

Upon the best consideration I have been able to give to the questions, I am prepared to accept the conclusions reached by the majority of my learned brothers, as best calculated to carry into effect the object of the statute.

It is to be hoped that the attention of those in charge of the legislation affecting the matter will be drawn to the apparent necessity for such amendments as may assist in more clearly expressing the intention of Parliament upon the point.

Upon the argument of the case, it was intimated that the object of the Crown in procuring the presentation of a case was solely for the purpose of obtaining a construction of the enactment, and not with any intention further to press the present prosecution.

In view of the intimation and of the opposing views held with regard to the questions, a new trial need not be directed.

GARROW, J.A. (after stating the case):—The total weight of the ring, which was stamped and sold as 9k gold, was 22.500 grains, made up of metal alloy 10.634 grains and of filling 11.866 grains. The gold in the metal alloy weighed 4.636 grains; and, if only the weight of the alloy is to be considered, as was the opinion of the learned Police Magistrate, there was clearly no offence, for the proportion of gold in the alloy considerably exceeded the 9k demanded by the statute.

The learned Police Magistrate based his conclusion upon the construction of “composition” in sec. 11 (b), which he held to mean the metal alloy and not the article or part of it. “The composition means the alloy, as I read the Act, not the article,” are his words. And the question is, whether that is the right construction.

The language of the statute certainly leaves something to be desired in the way of clearness. The object, to prevent the fraudulent marking of articles within its enumeration, is, of course, plain enough. And it is equally plain that, if the construction which commended itself to the learned Police Magistrate is to prevail, the statute would entirely fail of its purpose, for there would be nothing to prevent the manufacture and sale of an article as gold, marked even with the highest karat mark, although composed of lead or other cheap material within, and merely veneered, however thinly, with a gold alloy, so long as the alloy contained the requisite quantity of gold. That absurd result, it may safely be assumed, was not the intention; nor is it, in my opinion, the reasonable or necessary construction of the language of the statute, when carefully considered.

Section 3 declares (a) that “article” in the Act includes any portion of the article, whether a distinct part thereof or not. When part of the article is intended to be excepted from the commands and prohibitions of the statute, the exception is provided for, as in secs. 4, 6, and 7. On the other hand, sec. 13 provides for the case of an article the interior of which consists of an inferior metal, but covered with gold or silver, or an alloy of gold and silver, which is probably the class in which the ring in question properly belongs, although it was sold as of 9k gold. Clause (b) of that section requires a mark indicating the pro-

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portion of gold or silver to the gross weight of the article or part of an article. Section 9 applies to articles composed, wholly or partly, of gold or silver, or any alloy of gold or silver, and provides (2) that if such an article bears any mark it must have a mark truly and correctly indicating the quality of the gold, silver or alloy, and a trade mark, unless in the case of the exceptions therein mentioned, with which we are at present not concerned. The article may apparently be sold without having upon it any mark whatever, but if it bears a mark the mark must be one "not calculated to mislead or deceive" (sub-sec. 4 (c)).

Section 10 prohibits marking or selling any article purporting to be wholly or partially composed of gold or of any alloy of gold, if the article has applied thereto any mark indicating the gold in the article to be of less than nine karats in fineness.

Section 11, the section chiefly in question, provides that, "as respects articles composed, in whole or in part, of gold or of an alloy of gold—(a) marks indicating the quality of gold or alloy of gold used in the construction of the article shall state the fineness of the gold in karats, thus: 12k, 18k, or as the case may be; (b) the number of karats so stated shall bear the same proportion to twenty-four karats as the weight of the gold in the metal or alloy bears to the gross weight thereof; that is to say, 18k shall be deemed to mean that in the composition there are eighteen parts of pure gold and six parts of other ingredients."

To re-capitulate: sec. 3 makes the term "article" include every portion of it; sec. 10 prohibits marking or selling, as made of gold or an alloy of gold, any article with a mark indicating that the gold in the article is of less than 9k; sec. 11 directs that the mark shall indicate the quality of gold or alloy of gold used in the construction of the article; and sec. 13 provides for the case of an inferior metal covered with gold or silver (or an alloy of either), in which case the mark must indicate the proportion of gold or silver to the gross weight of the article, or part of it.

So far, the intention to make the article itself the basis of any computation as to its ingredients seems clear. Any confusion is caused, I think, by misapprehending the true meaning of the words "composed in whole or in part," in the first part

of sec. 11, and the word "composition," in clause (b) of the same section.

The section provides for two classes of articles, one composed wholly of gold or an alloy of gold—such, for instance, as a gold ring without setting, or a gold pen—the other, of gold or an alloy of gold and also some other separate material, such as a gold-headed cane or a gold-mounted dressing case. In an article falling within the first class, marked, for instance, 9k, it is clear that there must be nine twenty-fourths of gold. And the same result must follow as to any distinctive part similarly marked, by the application of the interpretation clause (sec. 3), which makes "article" include any portion of the article, whether a distinct part thereof or not; in other words, one must imply after the word "article," in the 4th line of sec. 11, the words "or part of the article," and after the word "composition," in the 11th line, the words "of the article or the part of the article as the case may be." And the words "the gross weight thereof," in the 9th and 10th lines, can only refer to the gross weight of the article itself, or of the part of it said to be of gold, and marked under the statute. There is no other subject-matter that I can see to which it can be reasonably referred. The fact is, the illustration does not really illuminate, but rather helps to darken what was none too clear before; although, upon the whole, the intention can, without reasonable doubt, I think, be spelled out.

For these reasons, I would answer the questions against the conclusion of the learned Police Magistrate, and direct a new trial, if the Crown so desires; although, under the circumstances, the Crown's purpose will probably have been served without that.

MACLAREN, J.A. (after setting out sec. 11 of the Act):—The questions reserved for this Court are, in effect, whether the rings marked nine karats were so marked correctly, when the gold in the alloy which formed the outer part of the rings was nine-twenty-fourths of the weight of such outer part, or whether the gold should form nine-twenty-fourths of the weight of the whole ring, including the cement or wax which was inclosed in and formed the inner part of the rings.

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I think the difficulty is caused by the use of the word "thereof" about the middle of clause (b). If the section had ended there, I think it might be fairly argued that only the weight of the gold and of the alloy were to be taken into account. Such a conclusion would, of course, be quite inconsistent with the whole scope and object of the Act; but the grammatical construction might require it to be adopted, even if it led to such a result. When, however, one reads the explanation or illustration which forms the latter part of clause (b), the use of the words "composition" and "ingredients" makes it evident that it is the weight of the article, and not of the alloy alone, that is to be taken into account; and that "thereof" does not refer to "alloy," but to a more remote antecedent, viz., "article."

If a manufacturer or dealer fills a hallow gold article with some non-metallic substance, as in this case, he may be able to protect himself by stamping it "G.F." (gold-filled), or by some other of the letters mentioned in sec. 15 of the Act, or by some other means of indicating to the purchaser the real nature of the article he is buying.

Unless this is done, I think the purchaser is justified in assuming that so much of the article as is not visible, but is presumably covered by the stamp placed upon it, is correctly described by it, and that there is no concealed foreign substance within or underneath, of which no intimation has been given in any way.

I would answer the three questions reserved by the Magistrate in the negative.

MEREDITH, J.A.:—The facts of the case are all admitted, and are simple: and the one question is, whether, in such facts, the accused has been guilty of any offence under the Act.

The rings in question were composed of a thin shell of nine karat gold, filled with cement or wax, the character of which filling has not been disclosed in the case: the filling more than doubled the weight of the ring: the rings were marked "9ct.;" and were in the possession of the accused with the intention of selling them. So that the accused intended to sell rings so marked that to ordinary purchasers they would appear to be of



a weight in gold of the quality of 9k, of more than double the amount of gold that was really in them: a very clear case of danger of the very kind the Act was intended to prevent: a case which, very obviously, ought to be within the provision of the Act, whether in truth it is or is not.

In the Imperial enactment of Geo. II. the preamble declares that "the standards of the plate of this Kingdom are both for the honour and riches of this realm and so highly concern His Majesty's subjects that the same ought to be most carefully observed and all deceits therein to be prevented as much as possible:" and this purpose forms the key-note of most of the legislation upon the subject; though in these days, and in this Dominion, the prevention of frauds upon the purchasing public is the predominant purpose.

The learned Police Magistrate thought that the rings had been so constructed for a fraudulent purpose—to use his own words "that there had been a fraud"—but, apparently with some hesitation, considered that the case was not within the words of the Act: that the filling was not part of the "composition" of the rings; and so found in favour of the accused, but reserved this case so that the question might be dealt with here.

It may be that, in drawing and in passing the enactment, cases in which the quality of the alloy would come in question were chiefly in mind; but the words used are quite wide enough to cover this case; and it is obviously one which ought to have been, and would have been, included in its penalties, if at all thought of.

Section 11 deals with articles composed, in whole or in part, of gold or any alloy of gold, and so plainly embraces these rings, which were composed in part of gold alloy and in part of cement or wax; so far there is, and can be, no contest; but sub-sec. (a), if read alone, would appear to refer to the gold or alloy in the composition only, that is, to one part only of the composition. The next sub-section, however, widens the wording of sub-sec. (a), and brings the whole section in accord with its opening words, "articles composed, in whole or in part, of gold or of any alloy of gold:" it requires that the number of karats marked on the article shall bear the same proportion to twenty-four karats'

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weight as the weight of gold in the alloy "bears to the gross weight thereof," and then proceeds to define this in the words, "that is to say, 18k shall be deemed to mean that in the composition there are eighteen parts of pure gold and six parts of other ingredients." These words, applied to the case in hand, require that the composition in question shall comprise nine parts of pure gold and fifteen parts of the other ingredients, whereas it in truth contains only 4.54 as against 19.46.

The word "thereof" may very well refer to the article to be sold as gold: indeed, if it were meant to refer to the alloy only, the expression would be a clumsy one; why not have said "its weight," why the "gross weight thereof"? But the concluding words of this sub-section seem to me to be entirely inconsistent with the ruling in question, to be consistent only with an interpretation which will bring this dangerous scheme within its provisions. Under these words, which explain and govern that which has gone before, the 9k stamped upon the rings means that in the "composition" there are nine parts of pure gold to fifteen part of other ingredients, "Composition" may—if, indeed, I should not say must—refer to the whole article, in accordance with the first words of the section, "composed . . . in part of . . . alloy . . ." The composition here is part alloy and part another ingredient. If "alloy" were meant, why say "composition"? And why give the word "composition," in the eleventh line of the section, a meaning out of accord with the word "composed," in the first line?

The instances of a gold-headed cane, a gold-mounted pipe, a gem in a gold setting, and the like, in no sense weigh against this view of the enactment; the stick is not, nor is the pipe, nor is the gem, the article referred to in the section, nor is it any part of it; the article is that which has the appearance of and may be sold as gold of a certain quality—the mounting or setting only—and that must be truly marked, as the Act requires, not in respect of that which in wood would be called a veneer, but its whole weight. Even the most unwary would hardly mistake the stick, pipe, or gem, for 9 karat gold.

I can find no good reason for making a hole in the Act through which these rings, and a vast number of other "frauds,"

as the Police Magistrate has designated them, can pass, impairing greatly its objects.

As applied to the facts of this case, I would answer all the questions reserved in the negative. There should be a new trial, if the Crown desire it; but, as I understood Mr. Jennings, that is not desired.

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MAGEE, J.A.:—The Court has reached a very desirable conclusion, at which I regret to say that I have not been able to arrive. Were it not for that conclusion, I would have thought it reasonably clear that sec. 9 of the Gold and Silver Marking Act, 1908, required a quality mark of only the gold or alloy in an article, and that sec. 11 likewise referred to the quality marking and weight of the gold or alloy only, and not of any separate substance of which an article, a ring for instance, might be composed or constructed, whether precious stone, paste, or cement, and whether visible or invisible. If a visible gem is to be excluded in the computation of the weight, I do not see how the invisible cement can fairly be included, without reading additional words into the section, even giving full effect to the possible interpretation under sec. 3 of "article," as meaning part of an article. Nor do I think that either gem or filling was intended to be described as an "ingredient" of the ring. That the Legislature did not consider the section to apply to the filling of articles, whether with metal or cement, I would also have thought manifested by secs. 13, 14, and 15, dealing with filled and plated goods, but only where metal is used. The possibility of filling with other substances would seem to have been overlooked. I am glad that the present decision renders the oversight, if there was one, less important. Even as to metal-filled goods, the Act would bear amendment with advantage. I need not enter upon a detailed reference to the wording of the various sections (both as to silver and gold), which would lead me to a construction different from that which the Court has been able to adopt.

The questions submitted are unnecessarily wide; and I would have restricted the answers, though I consider that the Police Magistrate was right in holding that the Act did not apply, and

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in acquitting the defendant upon this particular charge, whatever other charge, if any, he may have been open to with reference to any of the rings sold.

*Questions answered in the negative; MAGEE, J. A., dissenting.*

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### WALLACE V. EMPLOYERS' LIABILITY ASSURANCE CORPORATION.

*Accident Insurance—Temporary Total Disability—Double Indemnity—“Riding as a Passenger”—Injury to Assured in Alighting from Street Car.*

In an action upon an accident policy issued by the defendants to the plaintiff, the assured, by the terms of which, in the case of temporary total disability, he was entitled to \$25 a week for the period of disability, it was found that the plaintiff had suffered injuries resulting in a temporary total disability, within the meaning of the policy.

The policy further provided that, if the injuries were sustained while the plaintiff was a “passenger,” which meant, as defined by the policy, “while riding as a passenger in or upon a public conveyance provided by a common carrier for passenger service,” he should be entitled to \$50 per week.

The plaintiff's injuries were sustained in this way. He was a passenger on an open street car; he got off upon the highway when he arrived at his destination, but, before he reached the sidewalk, was confronted by danger from a passing automobile; in order to escape from that danger, he endeavoured to get on the street car again, and in doing so struck some part of the street car and was thrown down and so injured:—

*Held*, that the plaintiff, when injured, was still a “passenger,” within the meaning of the policy; either as not having completely or safely alighted and so being still in the act of alighting; or as being in the act of getting on the car to be carried to a place where he might alight with safety; and, therefore, he was entitled to the double indemnity.

AN action upon an accident insurance policy. The plaintiff, the assured, alleged temporary total disability from an accident which occurred after he had stepped off a street car of the Toronto Railway Company. In endeavouring to escape from an automobile, he attempted to get back upon the car from which he had alighted, and was in some way hurt by the car. He claimed \$50 a week for the period of disability, upon the ground that his injuries were sustained “while riding as a passenger in or upon a public conveyance provided by a common carrier

for passenger service," within the meaning of a clause in the policy in those words, or \$25 a week if he was not a passenger within the meaning of that clause.

October 4. The action was tried before MEREDITH, C.J.C.P., without a jury, at Toronto.

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*H. H. Dewart, K.C., and D. Urquhart*, for the plaintiff. The principle underlying *Theobald v. Railway Passengers Assurance Corporation* (1854), 10 Ex. 45, upon which *Powis v. Ontario Accident Insurance Co.* (1901), 1 O.L.R. 54, is based, applies here: the passenger remains a passenger until he has safely landed at his destination, i.e., where he is travelling by railway, got upon the platform. The street railway passenger similarly has not safely landed at his destination until he has reached the sidewalk. A danger encountered on the roadway between the car and the sidewalk is incidental to his use of the car as a passenger. The insurance is to indemnify against the risk undertaken in the journey and incidental thereto, and is ineffective unless this interpretation is placed upon the policy. The passenger is still a passenger until he reaches a place of safety *quoad* the journey undertaken. See May on Insurance, secs. 521 *et seq.*; *Northrup v. Railway Passenger Assurance Co.* (1869-71), 2 Lansing 166, 43 N.Y. 516. The phrase "riding as a passenger in or upon a public conveyance" must be liberally construed, so as to include everything incidental to the risk incurred by the passenger until the journey is safely terminated: *Tooley v. Railway Passenger Assurance Co.* (1873), 2 Ins. L.J. 275; *Depue v. Travelers' Insurance Co.* (1909), 38 Ins. L.J. 530.

*George Wilkie*, for the defendants. The plaintiff was not a passenger when he was injured. His passage had terminated upon his stepping off the car upon the public highway. When one steps from an electric car upon the street, not upon the premises of the railway company, he ceases to be a "passenger." Booth's Street Railway Law (1892), sec. 326. The cases holding that railway companies are liable to passengers have gone very far, but none of them so far as to say that one who has arrived at his destination and got completely off the property

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of the railway company, without any intention of returning, is still a passenger to whom the company would be liable. For definitions of "passenger," see Stroud's Judicial Dictionary, pp. 1423, 1424; Bouvier's Law Dictionary, Rawle's ed. (1897), p. 611; Beven on Negligence, 3rd ed., vol. 2, p. 947. The plaintiff had ceased to be upon the premises of the company, and had no intention of being or becoming a "passenger." He certainly was not "riding upon a public conveyance." Without doing violence to language, it cannot be said that a man standing upon the public highway was riding as a passenger in a public conveyance. It is not sufficient that he be a passenger—he must be "riding as a passenger." The cases cited on behalf of the plaintiff do not apply. The *Tooley* case goes the farthest, but no farther than this, that travelling by public conveyance includes getting on or off that conveyance.

November 16. MEREDITH, C.J.:—The action is on an accident policy issued by the defendants to the plaintiff, who is the assured, by the terms of which, in the case of temporary total disability, which is defined by the policy to mean "injuries not fatal and neither partial nor total, as described above, but which shall result in the assured being immediately, continuously, and wholly disabled, and thereby prevented from transacting any and every kind of business pertaining to his occupation," the assured is entitled to \$25 per week for the period of disability, not exceeding two hundred consecutive weeks; or, if the injuries are sustained while a passenger, which means, as defined by the policy, "while riding as a passenger in or upon a public conveyance provided by a common carrier for passenger service, or while riding as a passenger elevator or escalator, or while being in a burning building," to double that sum per week.

The payments are to be made, if the temporary total disability is for thirteen weeks, at the end of that period; or, if it exceeds that duration, at the end of each thirteen weeks during which the temporary total disability continues.

The claim of the plaintiff is resisted altogether, on the ground that there was no temporary total disability in fact, and that,

if it existed, it was not due to the injuries received; and the defendants contend that, if liable, they are not liable for the double indemnity, because the injuries were not received while the plaintiff was a passenger, within the meaning of the policy.

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The plaintiff was a passenger on the belt line of the Toronto street railway on the night of the 17th August, 1910, between nine and ten o'clock. His intended stopping place was that opposite the St. Lawrence Market, in King street. What occurred when he reached that point is not made very clear by his testimony, which was the only evidence as to the way in which the accident occurred. The account given of it in his examination in chief was:—

"I went to get off the car, and as I stepped off there was an automobile coming up the other street. I saw the automobile there, and I stepped back on the car again and reached to catch hold of the handle; and the car must have been in motion; because it threw me right around the other way, and I grabbed on to the mud-guard of the fender of the automobile, and the car pulled out from under me.

"Q. By 'the car' you mean the street car? A. The street car.

"Q. Then what happened? A. Well, I got up.

"Q. Well, but you fell? A. Yes, I was down.

"Q. You say the car was pulled from under you; what followed that? A. I got up as soon as I could when the car pulled out from under me. I had a hold of the guard of the automobile.

"Q. And? A. I got up, and I am positive it was the conductor asked me if I was hurt.

"Q. But before that. Tell me if you came in contact with anything? A. Nothing but the automobile. I must have fell on the street. When the street-car pulled out from under me, it threw me around against the car, and I had this left arm over the mud-guard.

"Q. Threw you around against what part of the car? A. It must have been against the seat or the edge of the car.

"Q. Was it an open car? A. Yes.

"Q. Do you know what part of you struck the car? A. I know my shoulder and the side of my head hit the car some place.

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"Q. And what happened so far as the rest of your body was concerned? A. Well, it was done so quick I do not know. The car, of course, pulled right out in an instant.

"Q. You have told us what happened so far as your shoulder is concerned. What else please?

"His Lordship: He says the shoulder and the side of his head hit the car.

"Mr. Dewart: Q. Any other part of your body? A. Well, I must have hit the edge of the car, the top of it, when I went in against the seat.

"Q. With what? A. My side must have hit it.

"Q. Then which way did you fall? How did you fall? A. I fell on my right side.

"Q. On what? A. I fell on the car.

"Q. And after striking the car, you say, the car went on? A. Yes.

"Q. Where did you fall then? A. I must have fell on the pavement then.

"Q. What became of the automobile? A. The automobile—he pulled right out. He asked me if I would get in, and I told him that I was as far as I was going.

.....  
"Q. At the time that you reached back and tried to get hold of the car, just tell me what the effect was upon you apart from what you hit. Was there any effect upon you? A. It jerked me right round. I made a grab when I felt the car going. I grabbed around to get hold the other way, and that is how I came to fall on my right side. The automobile was right in front of me—right alongside of the car.

"Q. Was it possible for you to have alighted from the car safely at the time that you attempted to do so? A. No; I either had to get back out of the way or the automobile would have run over me."

And on cross-examination he said:—

"Q. And you did get off? A. Yes.

"Q. Completely off? A. Yes, I stepped off. I just stepped off, and just stepped right back on again.

"Q. Then you answer me that you got completely off the car? A. Yes.



"Q. Then having got off, you say, you saw this motor car?

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A. Yes, the motor car was right on me. There was one just passed.

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"Q. And what made you get back on the street car again?

A. To get out of the way of the car that was right up against the street car coming on to me.

"Mr. Dewart: Motor car you mean? A. Yes.

"Mr. Wilkie: Q. Then you have told us that in grasping at the rail of the street car—or, if I am wrong, correct me—I gathered from what you said that in grasping at the rail of the street car you missed? A. Yes.

"Q. You missed your grasp and then you fell against the car? A. Yes.

"Q. And your side struck what part of the car? A. Well, I do not know. I fell over on my right side. I was on my right side when I got up.

"Q. You have told my learned friend that your shoulder struck some part of the street car? A. Yes."

At the close of the argument, I found that the plaintiff's injuries had resulted in temporary total disability, within the meaning of the policy, entitling him to the indemnity of \$25 a week; and reserved for further consideration the question of his right to the double indemnity.

It was strenuously argued by Mr. Wilkie, for the defendants, that the injuries had not occurred while the plaintiff was a passenger, within the meaning of the policy; and, that his account of the occurrence shewed that, before he was injured, he had left the car in which he had been travelling, and that his journey by the railway had come to an end.

I do not think that it can be said that the plaintiff had safely alighted from the car when he was injured. He was in the act of alighting; but, when he was confronted by the danger which he apprehended from the passing motor vehicle, he desisted from the act of alighting and endeavoured to get back on the car, and it was while doing so that he was injured.

It would be, I think, altogether too narrow a view to take of the definition of "passenger" which the policy contains, to limit

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the right to the double indemnity to cases in which the assured is actually in or upon the vehicle by which he is being or is to be or was conveyed. The cases cited by Mr. Dewart shew that a person travelling by rail remains a passenger until he has safely alighted from the vehicle, and is a passenger while in the act of entering or getting on or into the vehicle by which he is to be carried. The plaintiff's feet, no doubt, had reached the pavement; but he had not completely or safely alighted from the car; and, in my opinion, he was still a passenger, within the meaning of the policy, when he met with his injuries.

There is a further ground on which, in my opinion, the right to the double indemnity may be supported. Although the plaintiff had reached his destination and intended to terminate his journey at the point where he attempted to alight, he had the right, when he was confronted with the danger which he apprehended from the motor vehicle, or indeed if he was so minded for any reason, to get upon the car again and to be carried to a place where he might alight with safety; and that, putting his case on the evidence at the lowest, he was doing when he was injured. It may be that the railway company would have been entitled to another fare for the further journey, but that question is not material to the present inquiry, nor is it of any consequence that the plaintiff may have been guilty of negligence as between him and the railway company in attempting to get on the car again after it had begun to move.

If I am right in this latter view, *Powis v. Ontario Accident Insurance Co.*, 1 O.L.R. 54, is decisive in favour of the plaintiff.

The plaintiff is, in my opinion, entitled to judgment declaring that the injuries which he received on the occasion mentioned in his statement of claim resulted in temporary total disability, within the meaning of the policy, and to recover from the defendants for the aggregate of the weekly sums of \$50 which were payable at the commencement of the action, with costs. As only two periods of thirteen weeks elapsed between the date of the accident (17th August, 1910) and the date of the issue of the writ (15th March, 1911), there can be recovery in this action for only twenty-six payments; and the sum for which judgment is to be entered will be \$1,300.

[TEETZEL, J.]

## DE STRUVE v. MCGUIRE.

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*Intoxicating Liquors—Excessive Drinking in Hotel—Death from Exposure to Cold—Action by Personal Representative for Indemnity or Damages—Liability of Owner of Hotel and Bar-tender—Wrongdoers—Insurers—Liquor License Act, sec. 122—Proximate Cause of Death—“Caused by such Intoxication.”*

The legal representative of P., deceased, brought this action against an hotel-keeper and his bar-tender, under sec. 122 of the Liquor License Act, R.S.O. 1897, ch. 245, to recover indemnity or damages for the death of P., who was alleged to have come to his death by perishing from cold on a December day, while in a state of intoxication from liquor drunk by him to excess in the defendant M.'s hotel, furnished by the defendant C., the bar-tender. The evidence shewed that P. was drunk when he left the hotel, from liquor furnished to him there, and that he and two companions, who were also then drunk, started to walk home, a distance of twelve or fourteen miles, and on the way took several drinks from bottles of spirits which they had obtained at the hotel. P. was found about half way between the hotel and his home, lying on his back in the snow; he was taken home at once, and died in a few minutes after arrival there. The evidence as to when they took drinks from the bottles was not satisfactory; but the inference was that they did not do so for a considerable time after they started:—

*Held*, upon the evidence, that P. perished from cold; that he continued to be intoxicated from the excessive drinking in the hotel from the time he left it until his death; and thus it was “while in a state of intoxication from such drinking” that he came to his death, by perishing from cold.

*Held*, also, that the perishing from cold was “caused by such intoxication,” within the meaning of sec. 122.

That section gives a right of action, if the facts set forth in it are established in evidence, “as for personal wrong;” the principles applicable to actions of that nature apply to an action under the section; and, applying those principles, the liability depends upon whether the act of the defendant was the proximate cause of the injury, and it is immaterial whether the act of some other conducted or contributed to the injury, or may even have been the immediate cause of the injury.

*Scott v. Shepherd* (1773), 2 W. Bl. 892, 1 Sm. L.C., 11th ed., p. 454, applied.

And *held*, upon the evidence, that the intoxication of P., from the liquor furnished to him, and drunk by him to excess in the hotel, was the proximate cause of his death.

*Held*, also, that, if the legal effect of the enactment was to impose upon the defendants liability as insurers of the life of a person intoxicated, in the circumstances therein stated, against the contingencies therein mentioned—that is, if, while so intoxicated, he meets his death by perishing from cold or other accident caused by such intoxication—upon the facts of this case, the defendants were liable as such insurers.

ACTION by the administrator of the estate of John Pundzius to recover damages for his death, in the circumstances mentioned in the judgment.

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September 19. The action was tried before TEETZEL, J., without a jury, at Sault Ste. Marie.

*N. H. Peterson*, for the plaintiff.

*T. E. Williams*, K.C., and *J. L. O'Flynn*, for the defendants.

November 17. TEETZEL, J.:—The plaintiff is administrator of the estate of John Pundzius, deceased, and the defendant McGuire is the proprietor of a licensed hotel at Thessalon, and the defendant Coggin was his bar-tender.

The action is under sec. 122 of the Liquor License Act, R.S.O. 1897, ch. 245, which provides:—

“122. Where in any inn, tavern, or other house or place of public entertainment wherein refreshments are sold, or in any place wherein intoxicating liquor of any kind is sold, whether legally or illegally, any person has drunk to excess of intoxicating liquor of any kind, therein furnished to him, and while in a state of intoxication from such drinking has come to his death by suicide, or drowning, or perishing from cold or other accident caused by such intoxication, the keeper of such inn, tavern, or other house or place of public entertainment, or wherein refreshments are sold, or of such place wherein intoxicating liquor is sold, and also any other person or persons who for him or in his employ delivered to such person the liquor whereby such intoxication was caused, shall be jointly and severally liable to an action as for personal wrong (if brought within three months thereafter, but not otherwise), by the legal representatives of the deceased person; and such legal representatives may bring either a joint and several action against them or a separate action against either or any of them, and by such action or actions, may recover such sum not less than \$100 nor more than \$1,000 in the aggregate, of any such actions, as may therein be assessed by the Court or jury as damages.”

On the morning of the 24th December, 1910, the deceased and two companions, all foreigners employed in a lumber camp located about twelve or fourteen miles from Thessalon, walked into town, arriving at the defendant McGuire's hotel at about ten o'clock. They took several drinks before dinner and more after. The two companions took dinner, but the deceased was

at that time so drunk that he did not take any dinner. When they started for home, they were all intoxicated from the liquor furnished them by the defendant Coggin and drunk by them in the hotel. They wanted more liquor over the bar, but Coggin thought they were already too drunk to be furnished with more liquor in that way.

Just before leaving for home, at about two o'clock p.m., they purchased from another bar-tender, named Roach, in the employ of the defendant McGuire, five quart bottles of brandy and two of gin, which they carried away in a bag. The day was extremely cold.

The evidence as to *when* they took further drinks from the bottles is not very satisfactory; but, I think, the fair inference is, that they did not do so for a considerable time after they started.

The three not having returned to camp, a search party was sent out at about ten o'clock at night, and one of them was found about a mile and a half from the camp, very drunk; another of them about two miles further on, lying in the snow; and the deceased was found about half way between the camp and Thessalon, lying on his back in the snow. He was taken directly to the camp, and died in a few minutes after arrival there. It was the opinion of the doctor who saw the body shortly after death that the deceased had perished from cold; and I have no doubt, upon the whole of the evidence, as to the correctness of that conclusion.

The doctor also said that it was possible that, had the deceased not taken any further drinks out of the bottles, he could have got home without trouble; as he thought that, assuming that he had walked six miles before doing so, as to which there was some evidence given by the two companions, but not at all satisfactory, the exercise and lapse of time might have so sobered him up that he could have covered the balance of the distance without danger.

This was at best a mere conjecture on the part of the doctor, as he had not sufficient data upon which to form a reliable expert opinion.

Whatever the fact may be as to when the deceased took the

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first drink out of the bottles, there is no satisfactory evidence to enable me to find that, at any time after the deceased left the defendant's hotel, he had ceased to be intoxicated from the excessive drinking in the defendant McGuire's hotel. The most I can say is, that, in all probability, the extent of his intoxication had materially diminished, owing to fresh air and exercise as he progressed homewards, and until he took his first drink from the bottle; but, in my opinion, he continued to be intoxicated from the excessive drinking in the defendant McGuire's hotel from the time he left it until his death; and, in the words of the statute, it was "while in a state of intoxication from such drinking" that he came to his death, by perishing from cold.

Under the statute, in order to render the defendants liable, the deceased must not only have come to his death while so intoxicated from such drinking, but the perishing from cold or other accident must have been "caused by such intoxication."

Now the question is: What is the proper interpretation to be placed upon the words "perishing from cold or other accident caused by such intoxication?" Do they mean, "caused directly and solely by such intoxication," and do they exclude the idea of liability if such intoxication was only one of two or more concurring causes of death? Or do they mean only that the proximate cause of death, and not necessarily the immediate cause, must be traced to such intoxication?

It was held by the learned Chancellor in *Trice v. Robinson* (1888), 16 O.R. 433, that the section in question is to be viewed as a remedial measure; and, therefore, should receive a liberal construction.

The statute gives a right of action, if the facts set forth in it are established in evidence, "as for personal wrong;" and, therefore, I think the principles applicable to actions of that nature apply to an action under the statute.

In an action for a personal wrong, whether the wrong complained of is intentional or is the result of negligence, the liability of the defendant in damages depends upon whether his act was the proximate cause of the injury, and it is immaterial whether the act of some other person conduced or contributed to the injury, or for that matter may have been the immediate

cause of the injury. This principle is generally illustrated by reference to *Scott v. Shepherd* (1773), 2 W. Bl. 892, and 1 Sm. L.C., 11th ed., p. 454, the celebrated squib case, and has been applied in many subsequent well-known cases.

If I am right in applying this principle in this action, can it be properly held, upon the facts here, that the intoxication of the deceased, caused by his drinking to excess in the hotel, was the proximate cause of his death?

As already stated, I am of opinion that the deceased never recovered from such intoxication, and that to the very end it continued to operate as a weakening and debilitating influence upon the mind and body of the deceased.

While, as conjectured by the doctor, it may be that, if he had not taken further drinks from the bottles, he might have survived, yet the fact that he was so drunk in the defendant's hotel that he was unable to take his dinner, and continued to take further drinks until he left, satisfies me that his ability to withstand the cold and to accomplish his journey home had not only been seriously impaired by that intoxication, but it had produced such a condition of weakness that indulgence in further drinks from bottles would probably result in physical collapse. Or, to put it in another way, I think that, if he had not been already intoxicated when he took the drinks from the bottle, there would probably have been no disaster, not only because he would have had his normal physical strength and endurance, but he could have exercised his sober judgment upon the quantity, if any, to be taken from the bottles.

I am, therefore, of opinion that the proper conclusion is, that the intoxication of the deceased, from the drinks furnished to and drunk by him to excess in the defendant McGuire's hotel, was, within the principle of *Scott v. Shepherd*, the proximate cause of the death.

So far, I have treated the case as if the defendants are made wrongdoers under the Act; but it seems to me that, while sec. 122 declares the defendants "liable to an action as for personal wrong," upon certain facts being established, it may be fairly argued that the legal effect of the enactment is to impose upon the defendants liability as insurers of the life of a person in-

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toxicated, under the circumstances therein stated, against the contingencies mentioned in it.

If this is a proper interpretation of the effect and purpose of the section, the fact of the condition of the deceased when he left the defendant McGuire's hotel being established as coming within the Act, the question of the defendants' liability depends upon whether the evidence leads to the conclusion that the deceased came to his death owing to causes insured against by and within the limitations and conditions specified in the section.

Now, the subject of this so-called insurance was a man whose physical energies and mental faculties were weakened and impaired by intoxication in the defendant McGuire's hotel. The object of the insurance is to furnish some indemnity to his estate if, while so intoxicated, he commits suicide or meets his death by drowning, perishing from cold or other accident *caused by such intoxication*.

These latter words clearly would be satisfied if it were shewn that the accident happened either because the deceased was physically too weak by reason of the intoxication to protect himself against such accident, or because he committed some irrational or dangerous act short of a suicidal act, owing to his intoxicated condition.

It seems to me it would be in either of these ways that the Legislature must have contemplated that an accident could be *caused by such intoxication*.

Now, assuming the fact to be, as contended by the defendants' counsel, that it was the act of the deceased in drinking to excess out of the bottles that was the immediate cause of his death, that was clearly an irrational and dangerous act committed by the deceased, which I would attribute to his impaired mental and physical condition caused by the original intoxication; and, therefore, within the words of the Act, the death was "caused by such intoxication."

In the result, therefore, whether the defendants are to be treated as wrongdoers or as insurers, I find, upon the facts that they are liable; and I assess the sum to be recovered at \$500, with costs on the High Court scale.



[IN THE COURT OF APPEAL.]

FARQUHARSON V. BARNARD ARGUE ROTH STEARNS OIL AND  
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Nov. 20.

*Deed—Conveyance of Land in Fee—Exception or Reservation—Construction—“Mines of Minerals”—“Springs of Oil”—Rock or Coal Oil—Natural Gas.*

A reservation or exception, in a conveyance of land by the Canada Company to a farmer, in 1867, of “all mines and quarries of metals or minerals and all springs of oil in or under the said land, whether already discovered or not,” was held (MEREDITH, J.A., dissenting), not to include natural gas.

Judgment of BOYD, C., 22 O.L.R. 319, affirmed.

AN appeal by the defendants from the judgment of BOYD, C., 22 O.L.R. 319.

By consent, the appeal was taken directly to the Court of Appeal.

The action was brought against the Barnard Argue Roth Stearns Oil and Gas Company Limited and the Alexandra Oil and Development Company Limited, to recover damages for a wrongful entry upon the plaintiff's land; and against the two companies named and the Canada Company, for a declaration that they were not entitled, and none of them was entitled, to any right or interest in the land; and for an injunction and an account.

The defendants' appeal was against the part of the judgment which declared that they were not entitled to any gas products upon or under the land in question, and were liable to account to the plaintiff in respect thereof.

May 18 and 19. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, J.J.A.

*I. F. Hellmuth*, K.C., for the defendants the Canada Company. The purpose which the parties had in view was to enable Farquharson to acquire the land for farming, and to reserve it to the Canada Company for mining. There was, therefore, no conveyance to the farmer of the mineral gas, which could only be got by mining at a depth of 1,000 feet or

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more. The plaintiff paid only for the land—not the minerals. In *North British R.W. Co. v. Budhill Coal and Sandstone Co.*, [1910] A.C. 116, at p. 126, the conditions were reversed, “the leading purpose being to lay the permanent way,” and it was sought to take as minerals the very rock that formed the crust of the earth and supported the railway. The learned trial Judge has not given effect to the distinction in the circumstances of the two cases. The *Budhill* case was decided on the 15th November, 1909, and on the 16th December of the same year, the case of *Great Western R.W. Co. v. Carpalla United China Clay Co.*, [1910] A.C. 83, was decided by the same tribunal and some of the same law Lords. Both cases having been argued in July, 1909, were therefore under consideration at the same time. In the *Carpalla* case it was determined that china clay was a mineral within the meaning of a similar clause in the English Act, on the ground that it was not part of the ordinary composition of the district, and that its presence was rare and exceptional. See also *Caledonian R.W. Co. v. Glenboig Union Fireclay Co.*, [1911] A.C. 290. The case of *Lord Provost and Magistrates of Glasgow v. Farie* (1888), 13 App. Cas. 657, is distinguished, and it is pointed out that the *ratio decidendi* in that case was that that which was proposed to be removed from the soil would have been generally regarded in the locality as mere soil. The fact that the mineral was of no commercial value (if so) at the time of the conveyance makes no difference in the interpretation of the deed. The exception covers all the mineral substances lying in seams or beds or strata: Lord Herschell in *Midland R.W. Co. v. Robinson* (1889), 15 App. Cas. 19, at pp. 26 and 27. The word “minerals” should be given “its widest signification:” per Street, J., in *Ontario Natural Gas Co. v. Smart* (1890), 19 O.R. 591, at p. 595. The reservation in question covers undiscovered minerals. In construing the reservation, the learned Chancellor erroneously adopts the idea that the intention of the parties must have been to include only metallic substances in the word “minerals,” and limits accordingly that term. In construing the reservation so as to find out what the parties intended, the learned Chancellor erred in concluding that, because mineral gas was at the time of the conveyance unknown in a commercial sense, it was not in the contemplation of the parties; and that,

consequently, the word "minerals" should be limited so as to exclude it.

*Matthew Wilson, K.C., and J. F. Edgar*, for the other defendants. We are in the same interest as the Canada Company. We are for the licensees. The legal effect of the deed from the defendants the Canada Company, of the 22nd January, 1867, to Charles Farquharson, was to convey to the grantee the surface rights only. At the time of that conveyance, it was common knowledge that gas accompanied oil whenever and wherever the latter was found. Oil and gas are different forms of petroleum, and are both classified as minerals by scientific men. It was not contemplated by the parties to the deed that the Canada Company were entitled to the oil only, and Farquharson to the gas. We submit that the words "mines and quarries of metals and minerals in or under the said land, whether discovered or not," contained in the reservation, are sufficient to include both oil and gas, and that the addition to the clause of the words "springs of oil," cannot have the effect of narrowing this meaning. We refer to *Dunham v. Kirkpatrick* (1882), 101 Pa. St. 36; *Murray v. Allred* (1897), 100 Tenn. 100; and *Silver v. Bush* (1906), 213 Pa. St. 195.

*C. H. Ritchie, K.C., Thomas Scullard, and A. M. Stewart*, for the plaintiff. The deed is, apart from the exception, absolute in its terms, and not limited to any particular purpose or any particular mode of exercise of ownership, and the exception should be construed strictly. See *North British R.W. Co. v. Budhill Coal and Sandstone Co.*, [1910] A.C. 116. Even giving to the exception and reservation the widest interpretation, it does not, in its true construction, entitle the appellants to the natural gas. In order to bring gas within the terms of the exception, it is necessary to construe the term "mineral" as including gas, gas being clearly not a metal nor yet an oil. The term "mineral," even as used in scientific text-books, can hardly be said to cover gas. In one sense, everything not animal or vegetable may be said to be mineral, but in ordinary scientific use, the term "mineral," and in particular the term "minerals," has much more restricted use. In construing the document here in question, it is not the sense of the term as used in scientific text-books that is to be taken, but the sense in which the term was

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used in the vernacular of the mining world, the commercial world, and land-owners, at the time when the contract was made: *North British R.W. Co. v. Budhill Coal and Sandstone Co.*, [1910] A.C. 116, at pp. 127, 128; *Lord Provost and Magistrates of Glasgow v. Farie*, 13 App. Cas. 657, at p. 669; *Silver v. Bush*, 213 Pa. St. 195. Applying this test, it is clear upon the evidence that the term "minerals" cannot, in the present case, be construed to include gas. It was not so understood in the vernacular of the mining world or of the commercial world or of land-owners at the time when the contract was made. If the word "minerals" had been used in a sense to include oil, the specific mention of oil would have been unnecessary: *Attorney-General for the Isle of Man v. Mylchreest* (1879), 4 App. Cas. 294, at p. 308. And if the term "minerals" is used in a sense excluding oil, gas is *â fortiori* excluded. The appellants place some reliance upon the words "whether already discovered or not." We submit, however, that these words obviously refer, not to the discovery in a scientific sense of new minerals, but to the actual physical discovery of minerals upon the land. We also refer to *Ontario Natural Gas Co. v. Smart*, 19 O.R. 591, at pp. 594, 595, and *Ontario Natural Gas Co. v. Gosfield* (1891), 18 A.R. 626, at p. 630; *Hext v. Gill* (1872), L.R. 7 Ch. 699; and *Attorney-General for the Isle of Man v. Mylchreest*, 4 App. Cas. 294, at pp. 305, 308, 309.

*Hellmuth*, in reply.

November 20. Moss, C.J.O.:—This action was brought and is being maintained to establish and enforce against the defendants the property rights of Alexander Farquharson, who was in his lifetime owner of a certain lot of land described as lot number 6 in the 8th concession of the township of Tilbury East, in the county of Kent. The claim was and is, that the defendants were trespassing upon the lot in question; sinking wells and mining shafts, erecting derricks, and taking away oil and natural gas; and an injunction and damages were sought.

The defendants, in justification of their acts, pleaded the terms of a reservation or exception contained in the conveyance by the defendants the Canada Company of the lot in question to one Charles Farquharson, through whom the plaintiff's title is derived.

The action was tried before the learned Chancellor of Ontario, who determined that the defendants were not entitled to take and carry away the natural gas products upon or under the land in question, but were entitled to the oil products.

The appeal is by the defendants from so much of the judgment as negatives their asserted rights in respect of natural gas.

The plaintiff has not appealed. All questions with regard to the defendants' rights in respect of the oil products is, therefore, eliminated. The sole question now is, whether they have been properly denied the rights claimed by them in respect of natural gas.

The learned Chancellor has in his judgment stated the facts and summarised the testimony so fully, and, I venture to say, accurately, as to render unnecessary any further statement of them.

The question is an important one, inasmuch as it affects the rights, not only of the immediate parties to this action, but, we were told, of a number of other persons who hold lands under conveyances from the Canada Company similar to that under which the plaintiff claims.

In my judgment, the decision appealed from is correct. I am so thoroughly in accord with it and the grounds stated by the learned Chancellor that I do not think it would serve any good purpose to add many observations of my own to what has been said in support of his conclusions. But I desire to refer shortly to one or two of the contentions set up by the defendants. One of them is, that, under the conveyance, the parties took nothing more than a grant of surface rights. Reference to the instrument shews that neither does it purport to be, nor do the words of grant confine it to, a mere grant of that nature. There is an express grant and release to the grantee of the whole parcel of land, and all the right, title, and interest of the Canada Company to and in the same and every part thereof. Then follow the words of reservation, except for which no question could arise as to the possession by the grantee of an absolute title in fee simple to the land and every part thereof.

It is quite plain, as all the surrounding circumstances tend to shew, that there never was an intention on the part of the Canada

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Company to confine the grant to surface rights, nor any intention or desire on the part of the grantee to pay for or accept such a limited title—one so entirely opposed to the spirit and genius of the prevailing system of tenure and proprietorship of land in the Province.

Throughout the correspondence with the solicitors and the principal officers of the company in London, there was no suggestion of anything but a reservation of definite rights or interests. The intention was, that the grantee should be the purchaser and holder of the fee, and that, if deemed advisable, certain defined rights should be reserved to the grantors. The defendants must rely upon the words of reservation for their rights, for only to the extent of the proper meaning to be attached to them is the absolute grant of the title to the land to be deemed to be derogated from.

Another contention is, that the words of reservation, according to their true meaning and signification, include natural gas. The reservation is to be construed according to the ordinary rules, there being nothing in the context or the circumstances to give occasion for the application of any unusual or exceptional reading. No reason appears for extending the meaning of the language used beyond its fair and ordinary sense.

It seems somewhat singular that, if there was any intention to include natural gas among the reservations, some more apt words were not employed. If, as has been suggested, natural gas was then a substance unknown, or not known or regarded as one having a commercial value, the reason for not referring to it is plain. If, on the other hand, it was known, the deliberate omission to specify it by the use of apt words, or of some words resembling those used with regard to oil, leads to the conclusion that it was not intended to include it in the reservation. It can scarcely be conceived that, if it was intended to include it in the reservation, it would have been left to be covered by the general words upon which the argument is now hung.

Giving to these words the interpretation I think they should receive in the light of the evidence, I am unable to conclude that, occurring as they do in the conveyance in question, they included or were meant to include natural gas.

I think the appeal fails and should be dismissed.

GARROW, J.A.:—Appeal by the defendants from the judgment at the trial of the Chancellor, who found (in part) in favour of the plaintiff.

The case is reported in 22 O.L.R. 319, where the material facts are very fully set forth.

As will be seen, the learned Chancellor reached the conclusion that the exception in the conveyance in question included oil, but did not include natural gas.

The defendants appeal, claiming that it also includes gas. There is no cross-appeal.

I agree with the judgment of the learned Chancellor; and my only excuse for adding to what has been so fully and so well said by him is the importance of the case and its rather unusual nature.

The only question involved is one of interpretation. The subject-matter, natural gas, is not specifically mentioned. "Metals," "minerals," and "springs of oil" are.

Counsel for the defendants contend that it is included under the general term "minerals." They even make a wider contention: namely, that what was intended to be conveyed was merely the surface right, and that all else was reserved. The conveyance, however, is very plainly in fee simple, subject only to the exception, and what does not fall within it must belong to the grantee. For the rule of strict construction applicable in the case of an exception, the learned Chancellor refers to *North British R.W. Co. v. Budhill Coal and Sandstone Co.*, [1910] A.C. 116. That was the case of a statutory exception, involving, it may be said, special circumstances, but the rule is, I think, one of general application: see *Blackett v. Royal Exchange Assurance Co.* (1832), 2 Cr. & J. 244, at p. 251; *Savill Brothers Limited v. Bethell*, [1902] 2 Ch. 523, at p. 537. And the rule, as stated, is, that the language of an exception is deemed to be that of the grantor (here it actually was so in fact), and is not to be extended beyond that which it clearly covers; and, if the matter is left in doubt, the doubt is to be resolved in favour of the grantee.

Does, then, natural gas clearly fall within the term "minerals?" That term has first and last received a great deal of

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consideration in the Courts. The latest case, one of the highest authority, is the one to which I have just referred, *North British R.W. Co. v. Budhill Coal and Sandstone Co.*; and, from it, it is plain that the term has not in law a fixed, definite meaning, in other words, is not self-explanatory, but is the proper subject of interpretation and application according to the facts and circumstances in each case. That view was expressed in his brief judgment by Lord Justice James in *Hext v. Gill*, L.R. 7 Ch. 699, at p. 719, where he says: "But for these authorities I should have thought that what was meant by 'mines and minerals' in such a grant was a question of fact what these words meant in the vernacular of the mining world and commercial world and land-owners at the end of the last century" (the date of the grant was 1799); "upon which I am satisfied that no one at that time would have thought of classing clay of any kind as a mineral."

This view, after having been more than once commented on favourably, even when not followed, seems at last to have prevailed in our highest judicial tribunal: see *per* Lord Halsbury in *Lord Provost and Magistrates of Glasgow v. Farie*, 13 App. Cas. 657, at p. 669, quoting from the judgment of James, L.J., and the quotation approved and adopted in *North British R.W. Co. v. Budhill Coal and Sandstone Co.*, before cited, by the Lord Chancellor, at p. 124, by Lord Gorell, at p. 134, and by Lord Shaw, at p. 140.

The present was the case of the purchase by a farmer (he is described as "yeoman" in the conveyance), from a company primarily organised for colonisation purposes, and not to engage in mining operations; we know nothing of the particulars of the negotiation. The grantee, Farquharson, died before the trial; and, if the official who represented the company therein was alive, he was not called. There was some evidence as to what in the vernacular was considered to be the meaning of the words "natural gas," to which the learned Chancellor gave effect in the conclusion at which he arrived. It is not, I think, singular that there should have been so little of it, for it is a very difficult subject to establish, in that way; one difficulty is the time, which must, of course, be that before and at the date of the conveyance, early in the year 1867, or over forty years ago.



The evidence shews that at that time the oil industry itself was in its early infancy, oil having been first discovered in this Province about the year 1863. Those engaged in the oil production business were the only ones likely to know about even the existence of natural gas; and by them it was, upon the evidence, regarded simply as a useless and even a noxious thing, of no commercial value, the presence of which interfered with the operation of boring for and securing the oil. Mr. Coleman, the company's Commissioner, who was examined, said that the company knew it existed, but did not then regard it as of commercial value. It was in the early days only found to any extent in the operation of boring for oil. Now it has become much the more valuable product of the two, in the proportion it is said of about five to one. And it is found not only in conjunction with oil, but in fields by itself which do not produce oil; so that, although having chemical properties relating it to oil, it is evidently a separate and quite distinct natural product.

Mr. Coleman, as appears in the learned Chancellor's judgment, described the evolution of the exception, which helps to shed a little light upon the subject, at least as illustrating the standpoint of the company. At first, after the discovery of oil, the conveyances of the company, which theretofore had been conditional, were amended so as to except "mineral oil," but nothing else. Then, under the advice of counsel, it was amended to read as in the conveyance in question. Why "mineral oil" gave place to the less expressive and more obscure "springs of oil" is not explained; but Mr. Coleman gives, as the reason for the addition of "metals and minerals," the discovery on land of the company situated in the eastern part of the Province, of ores of iron, phosphate of lime, mica, etc. So far as appears, therefore, the company did not expressly intend by the use of the term "minerals" to include either oil or its chemical relative, gas. Now, the exception expressly mentions gas, in consequence, it is said, of the decision of this Court in *Ontario Natural Gas Co. v. Gosfeld*, 18 A.R. 626. That case arose in the year 1890, by which time gas had become of value. But that decision does not help the company here. No one now disputes or could success-

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fully dispute, in this Court at least, that natural gas is scientifically a mineral, and that the word "minerals" is large enough to include it if the context shews that it should be, or, in other words, if there is nothing to narrow its meaning to what, it is to be assumed, must have been the intention at the time the word was used. We are not called upon to say what would have been the result if "minerals" had been the only word used. But, upon the recent authorities to which I have referred, it might, I think, have been strongly questioned whether that term in January, 1867, would have included either oil or gas in a sale of land such as this. And any doubt which would in that case have arisen is clearly immensely increased when we find the conjunction of words which we have here, "mines and quarries of metals and minerals and springs of oil." The natural or unscientific mind, such, for instance, as my own, would, I have no doubt, have regarded the "mines and quarries of metals and minerals" as meaning solids such as are usually mined or quarried, and have concluded that the only other substance excepted was the liquid which was named. And that, in my opinion, is, under all the circumstances, the fair and reasonable interpretation to place upon the language in question.

I think the appeal should be dismissed with costs.

MACLAREN and MAGEE, JJ.A., concurred.

MEREDITH, J.A. (dissenting):—The judgment in appeal, in effect, "splits the difference" between the parties as evenly, perhaps, as possible, and yet leaves them in a deplorably uncertain and unsatisfactory position, as the learned trial Judge foresaw and tried to ameliorate by the suggestion of further splitting of differences, in some sort of a *modus vivendi* from time to time, which might enable them to make the most of a complicated and unfortunate state of affairs—a more difficult undertaking, I have no doubt, than that of determining the strict rights of the parties in this controversy. To refer to only a few of the difficulties which the judgment entails: what is to happen if each desires to mine at the same spot, or if one will not mine with the other or permit either to mine for both, or if, in mining the oil, gas escapes, and *vice versâ*? Indeed, at first sight, it seems like the

suggestion that the child be cut in twain and one-half given to each claimant, a suggestion which could not satisfy any one having a pecuniary interest in the thing to be divided; and though in that case, too, a suggestion of a *modus vivendi* might seem, to those having no personal interest in the matter, a good one, it could hardly be acceptable to either of the contestants, and would not be, in any case, their legal rights, or anything but a compromise, which they might have made between themselves without litigation, and which neither sought in coming to King or Court for justice.

The impracticability of the result is, of course, no answer to the judgment, if it be a true interpretation of the deed of the parties; but it is of evidential efficacy if the words of the deed be ambiguous.

The rights of the parties, fortunately for those who have to determine them, depend solely upon a proper interpretation of words which they have used in the deed upon which each relies.

That deed granted, to the predecessors in title of the plaintiff, the land described in it, except "all mines and quarries of metal and minerals and all springs of oil in or under the said land, whether already discovered or not, with liberty of ingress, egress and regress . . . in order to search for, work, win, and carry away the same, and for such purposes to make and use all needful roads and other works, doing no other unnecessary damage, and making reasonable compensation for all damages actually occasioned."

The grantee was a farmer, as all his successors in title have been; and, from the time of the grant, in the year 1867, until the present time, the land has always been acquired and occupied and used as farm land by them.

The single question is, whether the oil and gas in question passed to the grantee under the grant or remained in the grantors by reason of the exception.

Dealing first with the exception of "all springs of oil," it was suggested, and I think said, by one of the witnesses, that the word "springs" applies only to outcomings at the surface, that it was not applicable to anything underground: but that is obviously not so; the word "spring" has a very wide meaning, being

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synonymous in some respects with the word "well," one common meaning of each being source; and no oil springs, in this Province at all events, are surface springs, such as the flowing surface springs of water with which every one is familiar. Forced up by the gas, oil is met with in small quantities upon the surface, but these are but indications of the wells or springs below, which must be opened up by mining processes before the oil can be reached for practical purposes. But, if this were not so, the exception itself puts the matter expressly and clearly beyond doubt or controversy; it embraces "all springs of oil in or under the said land." So far, therefore, as all oil is affected, there is, in my opinion, no reasonable ground for contending that it was not excepted out of the grant. Whether that which is now called "natural gas" is included in that exception, is, no doubt, an arguable question, but is one which, I have no reasonable doubt, ought to be answered in the affirmative, because I can have no manner of doubt that such gas is a part, and an essential part, of every oil spring in this Province, and at the time when the deed in question was made was not known to have any existence except in oil wells. Indeed, as was then very obvious, and is now, though perhaps less so, the whole spring, or well, of the oil was, and is, the natural gas; without it there would be no springing, or welling, and the very name "oil springs" would be inappropriate and would probably never have been used. In earlier days, flowing wells of great force and magnitude were of common occurrence; by the force of the gas, the oil and gas together, as one body, were driven through the artificial openings with much force and in large volume; in these days the flowing well—the "gusher," as it is now commonly called—is the exception, for obvious reasons; but the same names remain—oil wells and oil springs—and have even been employed as a fitting name of one of the large towns which have sprung up among them; and accurately so, for, even where the force of the gas may not be able to raise the oil even to the surface, it still raises it to some extent, and is the only spring which causes the welling up to that extent. Wherever, therefore, oil and gas are combined in the same well, as they are in this case, each must be a part of that oil spring; and we have not to deal now with a mine or spring

of any other character: it will be time enough to consider the question of a mine in which there is no oil but all gas—mines which were unknown when the deed in question was made—when the question arises. There are, beside oil and gas, other substances of value taken from all oil springs, combined with the oil and gas: can it be said that, although they may be neither oil nor gas, the grantors are not entitled to them, and could it make any difference if some of them should turn out to be of so much greater value than the oil and gas that both of those substances should be spent or wasted in extracting them? Oil, in the oil regions, means petroleum, “rock oil,” “coal oil;” and petroleum includes natural gas. If, in the days when this deed was made, it had been suggested that under an “oil lease” the lessee took the oil and the landlord retained the gas that came with it, the suggestion would have been laughed at, if thought worthy of as much notice as that. It was not the oil merely that was excepted; it was the oil springs, and consequently all that they contained. Suppose the case of an exception of all the wells, or all the springs, of water, in or under the land, and that it was known that some gas caused the water to flow upwards with much force, and that the gas afterward turned out to be carbonic acid, which could be separated from the water and sold profitably, could it be contended that the carbonic acid, in the spring and water, passed to the grantee, and that pure water only was excepted: and that is really this case; or if radium could, and did, impregnate and flow with the water, even though unknown to the parties when the deed was made?

But, if that were not so, the exception covered “all mines and quarries of metals and minerals,” with a right of entry and possession for the purpose of obtaining and carrying away such metals and minerals—very comprehensive words, and words the comprehensiveness of which was, in no sense, intended to be circumscribed by the addition of the words “and all springs of oil.” Keeping in mind the fact that the deed was made only a few years after the discovery of petroleum in profitable quantities, and when little was known respecting it, and especially respecting its origin and nature, in regard to all its properties and uses, and bearing in mind also the evidence as to the uses

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of these and other somewhat similar words in the grantors' deeds, it is quite obvious that the words were added so as to strengthen, not weaken, the grantors' position, to avoid the loss of that which had created a fever of excitement—prospecting, speculation, and mining of petroleum of supposedly enormous value—in the next adjoining, and in this very, county. So that, if the words “and all springs of oil” do not add to the strength of the grantors' position, they certainly should not be permitted in any way to detract from it.

That the oil and gas in question are minerals, and that the means by which they are obtained is mining, in this Province, cannot, I think, be seriously questioned; in the Legislature, in the Courts, and in the administration of lands, forests, and mines, and in the bureau of mines, each is commonly so treated; and what else can they be? But it is said that, in the circumstances of this case, full effect is not to be given to their meaning. It is contended, in the first place, that “minerals” means minerals of a metallic nature only; but why so, and why so in the face of the fact that that which the parties had most in mind at the time was the newly discovered oil-bearing rock, in a country where metal-bearing rocks were unheard of, and, if possible, were extremely improbable? In the grant, to the grantors, the Crown had originally excepted all mines of gold and silver; but the grantors, instead of adopting such, or the like, words, and adding the word “minerals,” discarded the expression altogether, and adopted one which, in the plainest manner, shews that not only were not ores even uppermost in their intention, but that they meant to give a very wide meaning to the word “minerals,” using also the word “quarries,” which is commonly, if not quite exclusively, applied to surface mines of building stone, etc., as well as the words “metals and minerals.” I quite fail to perceive how it would be possible, justly, to limit these two words, standing alone, as they do in the deed, to metals and minerals of a metallic nature, or, in other words, to metals and metals: and this apart from the use of the word “quarries,” which, standing alone even, would repel the metallic contention.

Whatever may have been its origin, I cannot think that any one of intelligence would seriously argue in these days that

petroleum and all its component parts is, and are, not a mineral and minerals: they are just as much minerals as coal or diamonds, and of the same character; and it can hardly be contended that, if coal or diamonds had been discovered on, or in, the land, they would not have been the grantors', under the exception. So, too, as to the processes by which the oil and gas are reached and brought to the surface and under control, it cannot reasonably be contended that they are not mining. To one who has lived in sight, sound, and smell of the "oil fever" and all oil operations from their inception to the present day in Ontario, it will not do, and especially it will not do for those who were not born, or were in swaddling clothes, in the earlier days, to say that there is no mining in the discovery and production of petroleum; for unquestionably, in all their excitements and incidents and operations, there was just as much mining in the oil fields as in the gold or silver fields.

It ought not to be, but it may be, necessary to say that in this Province, as well as in other civilised communities, when mines exist under agricultural lands, it is the usual thing to grant the surface and the mineral rights separately; and that mines, as well as other things, were, under statutory enactment, generally, if not always, excepted out of Crown grants; and that, even at the present day, the Public Lands Act, sec. 15, R.S.O. 1897, ch. 28, provides that:—

"(1) It shall not be necessary hereafter in any letters patent granted under this Act or for agricultural purposes to mention the reservation to the Crown of mines, minerals, or mining rights, but the same shall be and are hereby reserved unless otherwise provided in the patent or grant from the Crown.

"(2) Such mines, minerals and mining rights, so reserved by the preceding sub-section, shall be property separate from the surface of the soil, or from the soil covering the same, and shall constitute a property under the soil, and shall continue to be the property of the Crown and be public property independent from that of the soil above it, unless the proprietor of the soil has acquired it from the Crown, as a mining location or otherwise.

"(3) . . . ."

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The exception from the grant in question is at least as comprehensive as the provisions of this enactment, and yet it would hardly be contended that petroleum—oil and gas—is not covered by the enactment, and so excepted from Crown grants.

And it may be added that there is little difference, if any, between the purposes of the Crown Lands Department and that of the defendants; each endeavours to make as much as it can out of the lands sold by it, and each is benefitted by the same means. Sales bring settlers, and settlement brings sale, enhancing prices to the benefit of the Crown Lands Department and the Canada Company alike.

And lastly, it is urged that a recent case, of the highest authority, requires that we should hold that neither oil nor gas is a mineral, within the meaning of that word as used in the exception in question; a contention, and a case, without which, it seems to me, the judgment in appeal would have been wholly in favour of the grantors: but that case, *North British R.W. Co. v. Budhill Coal and Sandstone Co.*, [1910] A.C. 116, as I understand it, is the opposite of this case, and, however examined, is strongly in the grantors' favour, as far as it is applicable.

It was relied upon, first, as establishing the principle that the meaning to be attributed to the word "minerals" is not its true meaning, as understood by the scientific or stated in the books, but is such as "every one," speaking generally, would attribute to it; a principle easily understood, and generally, but not always, applicable; inapplicable in this case, because, at the time when the deed was made, which is of course the criterion, petroleum, coal oil, rock oil, or the same thing under any of the many names applied to it in those days, was but newly discovered, and its properties little, if at all, known to "every one:" and so a test which is obviously useless in this case, whilst exceptionally applicable to the railway case in the House of Lords: but, even if the deed had been made but yesterday, I cannot think that that test would aid the respondent; for I have, after a very long experience among them, quite too much respect for the intelligence of my fellowmen in this Province to believe that the answer of "every one" to the question, "Is natural gas a mineral?" would be "no." On the contrary, I have no doubt that



the answers of a great number would be, "yes;" and that the answers of the majority would be after such a fashion as: "How can I tell?" "Give it up;" "Give me an easier one;" "Search the cyclopædias;" "Try some one else;" and the like; whilst few, indeed, if any, would be ignorant and conceited enough to say, "no." The testimony upon the subject is of little, if of any, weight. How could such witnesses know without trying? And none testified to even a single instance of such qualification.

Then, the owners of the land, in the railway case, were a railway company, and they had acquired it, under an Act of Parliament, for the purpose of operating their ways, and the exception was, "any mines of coal, ironstone, slate or other minerals under any land purchased by them." The plaintiffs' contention was that ordinary sandstone was a mineral: and, therefore, did not pass to the railway company. It is necessary only to quote some statements of fact from the speech of the Lord Chancellor, and some of his observations, to shew how easily it might be determined, in that case, that the word "minerals," as used in the enactment, did not include common sandstone:—

"In considering whether sandstone is a mineral within the meaning of" the enactment "it is as well to look at the purpose which was in view when that Act was passed. The purpose was to enable a railway company to acquire land and build a railroad thereon to carry passengers and goods. . . In many parts of England and Scotland sandstone forms, as here, the substratum of the soil, with, no doubt, other kinds of rock intermixed. If it be a mineral, then what the railway company bought was not a section of the crust of the earth subject to a reservation of minerals, but a few feet of turf and mould, with a right to lay rails upon it, and liable to be destroyed altogether, unless the company chose on notice to buy the ordinary rock lying beneath it. For no one pretends that there was anything exceptional in this sandstone, either in point of higher value or rarity. It was agreed at the Bar that this was the ordinary freestone or sandstone. If the respondents are entitled to work this substance under this railway, the same must be true of chalk, or clay, or granite, or any other rock which forms the crust of the earth. . . I think it clear that by the words 'or other minerals' exceptional substances are designated, not the ordinary rock of the district."

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Now let us apply both the letter and the spirit of that case to this case; in the first place, it will be noted that there is no particularising in this case, as there was in the other, the metals or minerals, which might tend to minimise the effect of the general words. And there is also in this case the use of the word "quarries," a word which so plainly points to building stone, at least, that no one can reasonably say it could not have had any effect, had it been included in the words of the enactment which was interpreted in the other case. In that case, the minerals were excluded because they were not exceptional substances; in this case, they are excluded because they are exceptional substances; and so this case is much more like *Caledonian R.W. Co. v. Glenboig Union Fireclay Co.*, [1911] A.C. 290, in which the fine clay there in question was held to be a mineral because of an exceptional character.

In the next place, the purchaser in this case was a farmer, buying the land for farming purposes, purposes for which alone they were used by him and have been by those claiming under him for probably forty years, or more, without any sort of assertion of any other right or purpose; a purchaser who paid only the price of farm lands, getting the land at a reduced price because he was not acquiring any mining right or quarrying rights in metal or minerals or any rights in any springs of oil in them; so that the grantors' position is, substantially, the same as if they had bought from the grantee all such rights and had paid for them and received a valid conveyance from him of them; whilst, on the other hand, though the grantors were so parting with the land, they were expressly, and in plain and wide words, retaining all such mining rights, and the oil fields and their products were especially in the minds of the parties, because of the public excitement over the discovery of such sources of wealth which had not very long before been made in that locality; so that no one can reasonably doubt that the intention of the parties was, that the grantors should retain the possibilities of benefit from all such extraordinary uses of the land—possibilities which then may have appeared to be meagre, and so such as a farmer, seeking a farm for farming purposes, would, wisely, ordinarily be willing to let some one else take in exchange for cash in hand of no

great amount; whilst the grantee was intended to take all the farming uses and benefits of the land; as well as to be compensated for injury to such uses by the exercise of the mining rights retained by the grantors.

Having regard to all these things, the position of the parties in this case seems to me to be the opposite of that of the parties in the other case; and, therefore, that that case, in its spirit and letter, strongly supports the grantors' claim, and gives no encouragement whatever for any attempt to minimise, or in any way cut down, the meaning and effect of the words "all mines and quarries of metals and minerals," followed, as it is, by the right, expressly conferred by the deed, to take the necessary steps to win and carry away all such metals and minerals.

Much stress was laid by the respondent upon an old rule of interpretation as to construing an exception strictly, and the railway case was relied upon as a new affirmation of that principle; but all that that case contains upon the subject of strict interpretation is the quotation with approval, by the Lord Chancellor only, of the words of the dissenting Judge in the Court below, words which were governed by the key-note of the whole case and which were expressed by the Lord Chancellor thus: "Now, the leading purpose being to lay the permanent way, how are we to regard this exception of minerals?" And the same note pervades the quoted words; they are not that, merely because the words to be interpreted occur in an exception out of the grant, they are to be strictly interpreted, but are: "Any provision inconsistent with the leading purpose for which railway companies are empowered to take land must be viewed as introducing an exception, and falls to be construed strictly, and not extended beyond what the words of the exception clearly cover." Apply the spirit of those words to this case, and do they not mean, if at all applicable, to it, merely this, that the main purpose of the parties being to give to the purchaser the lands for farming purposes and to the grantors for the mining rights, any words that might alter that purpose, in either respect, ought to be strictly construed; which—if I may be permitted to say so—is common sense; the key-note is, the purposes of the parties. But in all interpretations of all such deeds, and other

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writings, the true meaning of the parties must be the ultimate object; and where the parties were really agreed and have expressed that agreement, the Courts should, and ought to be able to, find, and give effect to, it; whilst, if the parties have really never been at one, there is no agreement and no power in the Courts to make one for them. The old rule can hardly be said to be very vigorous in these days, whether it was ever applicable to a deed *inter partes*, an indenture, or not; and, whether vigorous or not, has not, as far as I can see, received any re-encouragement from the Lord Chancellor, or from the learned Scottish Judge, in the railway case.

I am not, of course, in this case, or any other, at liberty, consciously or unconsciously, to do the greatest good to the greatest number; nor to help the individual against the corporation: I am bound to endeavour only to give to each of the parties exactly that which was contracted for.

I would allow the appeal.

*Appeal dismissed; MEREDITH, J.A., dissenting.*

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[RIDDELL, J.]

RE RALLY.

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*Will—Construction—Legacy of Specific Sum in Hands of Third Person—Debt Owing to Testatrix—Payment before Death—Lapse of Legacy—Petition for Advice of Court—Trustee Act, sec. 39(1)—Scope of—Petition Changed into Originating Notice under Con. Rule 938(a)—Practice.*

A testatrix bequeathed to C.R. the sum of \$500, "being the amount of money now in the hands of W.A.R. belonging to me and not secured by mortgage it being my intention to devote that specific money to be paid by the said W. A. R. to the said C. R." At the time the will was made, W. A. R. owed the testatrix \$500 for money advanced by her to him, and this was not secured by mortgage. Afterwards she demanded payment of all the money owing to her by W. A. R., and the same was repaid to her. The moneys paid to her by W. A. R. were deposited in a bank, and between the date of the will and the date of her death—a period of about eighteen months—she had always on deposit in a bank at least \$600, and at the time of her death she had more than \$1,000:—

*Held*, that, as the chose in action bequeathed to C.R. had been changed by the testatrix into a chose in possession, C.R. was not entitled to be paid \$500 out of her estate—the legacy lapsed.

*Freuen v. Freuen* (1875), L.R. 10 Ch. 610, applied and followed.

Section 39(1) of the Trustee Act, R.S.O. 1897, ch. 129, does not give the Court power to determine the rights of the parties or any party under a will, upon petition.

*Re Hooper* (1861), 29 Beav. 656, and *In re Williams* (1868), 1 Ch. Ch. R. 372, followed.

The executor's petition for the advice of the Court, under sec. 39(1), was, by consent, turned into a motion upon originating notice, under Con. Rule 938(a).

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PETITION by the executor of the will of Isabella Rally, deceased, for the advice of the Court as to whether a certain legacy had lapsed.

November 23. The motion was heard by RIDDELL, J., in the Weekly Court at Toronto.

*D. L. McCarthy*, K.C., for the next of kin and executor.

*Shirley Denison*, K.C., for the legatee.

November 24. RIDDELL, J.:—The late Isabella Rally, about the 1st September, 1899, made a will, giving to each of three nieces named "an equal share of all my ready money securities for money and household furniture." Thereafter, and about the 18th June, 1900, she made another will, containing the following: "I give and bequeath to Charles Rally the son of my step-son William A. Rally of the city of Albany in the State of New York the sum of five hundred dollars being the amount of money now in the hands of the said William A. Rally belonging to me and not secured by mortgage it being my intention to devise that specific money to be paid by the said William A. Rally to the said Charles Rally."

At the time this will was made, William A. Rally owed Isabella Rally the sum of \$500 for money advanced by her to him, and this was not secured by mortgage. Afterwards, she demanded payment of all the money William A. Rally owed her, and the same was repaid to her—so that, at the time of her death, William A. Rally owed her nothing.

Before the repayment of these sums, she had to her credit in the bank \$240.37; these sums, being also deposited, raised the deposit to \$1,442.12. She then invested, from this money, \$800 upon a mortgage, which was outstanding at the time of her death;

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her bank account was kept up, and at no time shewed a credit of less than \$600, and at the time of her death it stood at \$1,097.83.

She died on the 15th February, 1911.

Charles Rally demands the payment to him of the sum of \$500; and the executor files his petition and requests "to be advised if, in the opinion of this Court, the said legacy has lapsed, or whether the same is still payable to the said Charles Rally"—counsel certifying that the case "is a proper one for the advice of a Judge of the High Court of Justice under the Trustee Act."

The Act referred to is, no doubt, R.S.O. 1897, ch. 129, and the application is made under sec. 39 (1). This legislation was originally passed in 1865, as 29 Vict. (Can.) ch. 28, sec. 31, and was continued in the several revisions, R.S.O. 1877, ch. 107, sec. 35; R.S.O. 1887, ch. 110, sec. 37; and R.S.O. 1897, ch. 129, sec. 39. Until the revision of 1897, the statute prescribed that the application was to be by petition or by summons; the revision of 1897 made a change, and provided that the application should be "in the manner prescribed by Rules of Court."

But, very early, it was decided that this statute was not intended to give the Court power nor did it give the Court power to determine, upon petition, the rights of parties or of any party under a will—it was only "the opinion, advice, or direction of a Judge . . . on any question respecting the management or administration of the . . . property" that could be obtained—*e.g.*, the advisability of selling, investing, re-investing, and the like, *i.e.*, mere matters of administration or management—in a word "to assist trustees in the execution of the trusts, as to little matters of discretion:" *Re Hooper* (1861), 29 Beav. 656, a decision upon Lord St. Leonards's Act, 22 & 23 Vict. (Imp.) ch. 35, from which our Canadian Act was taken. *In re Williams* (1868), 1 Ch. Ch. R. 372, is a decision of Mowat, V.-C., upon our original Act, and is to the same effect. So far as I know, this rule has been consistently followed.

It was necessary to file a bill to determine the rights of parties, but the Judicature Act, again following English precedent, has provided a cheap and speedy method without the

issue of a writ, by originating notice. Con. Rule 938 (a) is the Rule to apply—and that provides for notice of motion.

I, with the consent of all parties, as all parties were represented before me, turned the petition for advice into a notice of motion under Con. Rule 938 (a); and I have heard the parties.

Upon the merits, after reading the cases cited and some more, I am of opinion that the legacy has lapsed.

The testatrix intended to bequeath and did bequeath a chose in action, intending to give Charles Rally the right to receive a sum of \$500 from William A. Rally; for there is no pretence that a certain sum of money in coin or otherwise was set apart and was held in custody and possession by William A. Rally as bailee for her. What she means by "specific money" is not a "specific" heap of coins, but the sum of \$500 which she had already specified as not being secured by mortgage.

Then she herself changed the chose in action into a chose in possession, thereby destroying the chose in action. She had "intended the thing itself to pass unconditionally, and in *statu quo*, to the legatee"—per Lord Selborne, C., in *Robertson v. Broadbent* (1883), 8 App. Cas. 812, at p. 815—and she destroyed that "thing."

And it does not help that the "thing" is changed into something else—that "something else" will not pass.

In *Frewen v. Frewen* (1875), L.R. 10 Ch. 610, the devise was of two advowsons in Ireland. By the Irish Church Act, 32 & 33 Viet. (Imp.) ch. 42, the Irish Church was disestablished, and the right of patronage and power of appointment taken away; but Commissioners were to declare the amount of compensation to be paid to any who made application within three years. The testator made application, or rather gave instructions for an application to be made, to the Commissioners. The Vice-Chancellor, Hall, decided that the devisee could not take the money awarded by the Commissioners. Upon an appeal to the Lords Justices, the decision of the Vice-Chancellor was upheld. James, L.J., says: "The Act of Parliament destroyed the advowson, that is to say, it converted that which was an advowson . . . into something different. . . . The property, which was vested in the testator at the time the Act was passed,

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had its character permanently changed and practically destroyed . . . that is to say, the conversion of that which was an advowson in the hands of the then owner into a right to receive the compensation which shall be assessed by the Commissioners."

I cannot see that the destruction of the right to receive money by receiving the money in hand is any less a conversion into something else, so as to adeem the legacy, than the destruction of a "something else" in possession of the owner and changing that into the right to receive money.

I am of opinion that the claim of Charles Rally cannot prevail.

There will be no costs—none to the claimant, he was wholly wrong in his claim—and none to the executor, he was wrong in his practice, and he escaped paying the costs of a dismissed petition simply through the complaisance of the claimant.

The following authorities may be looked at: *Innes v. Johnson* (1799), 4 Ves. 568; *Sidebotham v. Watson* (1853), 11 Hare 170; *Ellis v. Walker* (1756), Amb. 309; *Nelson v. Carter* (1832), 5 Sim. 530; *Day v. Harris* (1882), 1 O.R. 147; *Smallman v. Goolden* (1787), 1 Cox Eq. 329; Jarman, 6th ed., pp. 1063, 1067, 1071, note (m); *Bevan v. Attorney-General* (1863), 4 Giff. 361, 369; *Robertson v. Broadbent*, 8 App. Cas. 812, at p. 815; *Higgins v. Dawson*, [1902] A.C. 1, and cases cited.



[MULOCK, C.J. Ex. D.]

HELLER V. GRAND TRUNK R.W. CO.

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Nov. 24.

*Railway—Injury to Passenger—Total Exemption of Company from Liability—Special Contract—Approval by Board of Railway Commissioners—Shipper of Animal—Privilege of Travelling at Reduced Rate—Railway Act, secs. 284, 340—"Impairing"—Knowledge of Passenger of Terms of Contract—Immateriality.*

By the terms of a special contract, in a form approved by the Board of Railway Commissioners for Canada, it was agreed between the defendants and the plaintiff, a shipper of a horse by the defendants' railway, that the defendants, granting to the plaintiff, travelling on the train in which the horse was being carried, for the purpose of taking care of it, the privilege of travelling at a reduced fare, should "be entirely free from liability in respect of his death, injury, or damage," whether caused by negligence or otherwise. The plaintiff, while so travelling, was injured, and brought this action to recover damages for his injury:—

*Held*, that the defendants were authorised to make the contract, and were thereby relieved from liability to the plaintiff.

Sections 284 and 340 of the Railway Act, R.S.C. 1906, ch. 37, considered. The word "impairing" in sec. 340 is intended to cover the case of total exemption from liability.

*Held*, also, that it was immaterial whether the plaintiff, who signed the contract, had read it or knew its contents.

ACTION for damages for injury to the plaintiff when travelling on the defendants' railway, in the circumstances stated below.

October 3. The action was tried before MULOCK, C.J. Ex.D., and a jury, at Brantford.

W. S. Brewster, K.C., for the plaintiff.

I. F. Hellmuth, K.C., and W. E. Foster, for the defendants.

November 24. MULOCK, C.J.:—On the 30th September, 1910, the plaintiff shipped a horse by the defendants' railway at Paris, to be carried to Toronto, under the terms of a special contract, which, among others, included the following term: "In case of the company granting to the shipper or any nominee or nominees of the shipper a pass or a privilege at less than full fare to ride on the train in which the property is being carried, for the purpose of taking care of the same while in transit and at the owner's risk as aforesaid, then, as to every person so travelling on such a pass or reduced fare, the company is to be

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entirely free from liability in respect of his death, injury, or damage, and whether it be caused by the negligence of the company, or its servants, or employees, or otherwise howsoever. It is further agreed that under no circumstances shall any officer, agent, or employee of the company waive, verbally or otherwise, the provisions of this contract or any of them." This is signed by "C. Murels, agent;" and at the foot are printed the following words, "The shipper declares that he fully understands the meaning of this special contract," which foot-note was signed by the plaintiff, as the shipper in question. Thereupon he was given a ticket for himself, at half the regular fare, and permitted to proceed in charge of his horse by the same train.

This train consisted of about fifty freight cars, with a caboose at the end; and, when approaching the St. George street bridge, its speed was suddenly checked by the application of the brakes. At the time, the plaintiff was sitting on the caboose, facing towards the engine, and the sudden checking of speed threw him forward against the glass of the front door, causing the injuries complained of in this action.

The following are the questions submitted to the jury with their answers:—

1. Were the defendants guilty of any negligence which caused the accident? A. Yes.

2. If so, in what did such negligence consist? A. Fault of engineer applying brake too quick.

3. Had the plaintiff an opportunity of knowing that the special contract in question contained a term relieving the company from liability in respect of injury to him when riding on the train in which his horse was being carried? A. He had not.

4. Did he, when riding on said train, know of the contract containing such term? A. No.

5. What damages, if any, do you award the plaintiff? A. \$500.

As to the answers to questions 3 and 4, the evidence shews that the plaintiff signed the shipping bill in question at the request of the defendants' agent. The plaintiff said that he was urged by the agent to hurry up and sign it and get into the caboose, and that he did so without reading it or knowing its contents.

The plaintiff is not an inexperienced shipper by the defendant company, and his signature was not obtained by fraud. It is, therefore, immaterial that he may not have read the contract or even may not have known its contents: *Parker v. South Eastern R.W. Co.* (1877), 2 C.P.D. 416; *Taylor v. Grand Trunk R.W. Co.* (1902), 4 O.L.R. 357, 362.

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The defendants rely on the special contract, which was approved of by the Board of Railway Commissioners for Canada, as relieving them from liability; and the question is, whether it is competent for the company thus to contract themselves out of liability.

Section 284 of the Railway Act requires the company with due care to carry traffic, which includes passengers; and sub-sec. 7 of that section declares that "every person aggrieved by any neglect or refusal of the company to comply with the requirements of this section shall, subject to this Act, have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or of its servant."

Section 340 enacts as follows: "No contract, condition, by-law, regulation, declaration or notice made or given by the company, impairing, restricting or limiting its liability in respect of the carriage of any traffic, shall, except as hereinafter provided, relieve the company from such liability, unless such class of contract, condition, by-law, regulation, declaration or notice shall have been first authorised or approved by order or regulation of the Board. 2. The Board may, in any case, or by regulation, determine the extent to which the liability of the company may be so impaired, restricted or limited. 3. The Board may by regulation prescribe the terms and conditions under which any traffic may be carried by the company."

The effect of sec. 340 has been considered in various cases which are collected and referred to in *Sutherland v. Grand Trunk R.W. Co.*, 18 O.L.R. 139; and it may be accepted as settled law that a railway company may, by special contract, limit its liability for negligence where the Board of Commissioners has approved of the general form of the contract; but in

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none of those cases was it necessary to determine whether, even with the sanction of the Board, the company could contract itself out of liability.

*Goldstein v. Canadian Pacific R.W. Co.* (1911), 23 O.L.R. 536, was cited as supporting that view; but in that case the defendants admitted liability, and the Court was not called upon to determine the point involved in the present action.

The prohibition against railway companies contracting themselves out of liability for damages because of their negligence, substantially borrowed from Imperial legislation, first appears in Dominion legislation in the Railway Act of 1868 (31 Vict. ch. 68, sec. 20), and was in force (3 Edw. VII. ch. 58, sec. 214) when power was conferred on the Board of Railway Commissioners (3 Edw. VII. ch. 58, sec. 275, now sec. 340 of the Railway Act) to sanction contracts affecting a railway company's liability for negligence.

Reading the whole of sec. 340, it seems to me that the intention of Parliament was to change the law by enabling a company to do what it could not before do, viz., contract itself either wholly or partly out of liability. The words "restricting or limiting" meet the case of a partial exemption from liability; and the word "impairing" was, I think, intended to cover the case of total exemption from liability. It is not the most appropriate word to convey that idea, but such is, I think, its meaning as used here. The dictionary meaning of "impair" is "to make worse, less valuable, to weaken, to lessen injuriously, to deteriorate, to affect injuriously," etc. Clearly, the word was not used here in any such sense. A liability like a cause of action exists or does not. Then in what sense was it used? It was not necessary for the purpose of "restricting or limiting" liability. Unless, therefore, it is given the meaning of "exempting from" liability, it is meaningless. My opinion is, that it was used in that sense; and, therefore, under sec. 340, the company, having the approval of the Board of Railway Commissioners to their form of contract, were entitled to make the special contract in question whereby they are relieved from liability to the plaintiff.

This action, therefore, fails, and should be dismissed with costs.

## [DIVISIONAL COURT.]

RE MACK AND BOARD OF AUDIT OF THE UNITED COUNTIES OF STORMONT DUNDAS AND GLENGARRY.

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*Sheriff—Criminal Justice Returns—Fees—Liability of County Corporation—10 Edw. VII. ch. 41 (O.)—Return Transmitted through the Sheriff—Report made in Duplicate—Remedy of Sheriff—Mandamus to County Board of Audit—Parties—Attorney-General.*

June 26,  
Nov. 25.

The Board of Audit of the United Counties refused to pass certain items in the account of the Sheriff for services rendered in making monthly returns to the Inspector of Prisons and Public Charities of insane persons in gaol and foreigners in gaol, annual returns of foreigners committed to gaol, quarterly returns of supplies in gaol, and quarterly returns to the Counties Treasurer of prisoners in gaol:—

*Held*, that these were returns made to the Government, connected with the administration of criminal justice, within the meaning of the Act 10 Edw. VII. ch. 41 (O.); and the Sheriff was entitled to be paid, for his services in making them, the fees set out in the schedule to that Act.

History of the legislation.

Any return which, to make it official, is transmitted through the Sheriff, is a return for which the Sheriff is entitled to be paid; but a report required to be made in duplicate is but one report, and is to be paid for as one.

*Held*, also, that the Sheriff was entitled to a mandamus requiring the Board of Audit to pass his account.

*Seemle*, that the Attorney-General was not a necessary party to the proceedings in respect of the application for a mandamus, but it would not be improper that he should be notified of the proceedings.

Order of BRITTON, J., affirmed.

MOTION on behalf of the Sheriff of the United Counties for a mandamus requiring the Board of Audit of the United Counties to pass an account of the Sheriff for services rendered by him, and to authorise payment thereof by the Counties Treasurer.

June 7. The motion was heard by BRITTON, J., at the Cornwall sittings.

R. A. Pringle, K.C., for the Sheriff.

W. B. Lawson, for the Board of Audit.

June 26. BRITTON, J.:—The items in dispute in the account are the following:—

(1) Monthly returns, to the Inspector of Prisons, of insane in gaol, each return, \$4.

(2) Monthly returns, to the Inspector of Prisons, of foreigners in gaol, each return, \$4.

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(3) Annual returns of foreigners committed to gaol, for each preceding year, each return, \$4.

(4) Quarterly returns, to Inspector of Prisons, of supplies in gaol, each return, \$4.

(5) Quarterly returns, to Counties Treasurer, of prisoners in gaol, each return, \$4.

In the notice of motion there is a further item for certifying and returning to the Counties Treasurer the list of petit jurors, but this was abandoned on the argument.

It was admitted that the Sheriff performed the services charged for.

The objections are that these fees are not properly connected with the administration of justice, and that the counties paying these fees cannot be reimbursed out of the Consolidated Revenue Fund, under ch. 102 and ch. 104, R.S.O. 1897.

The question is wholly one of returns. In dealing with it, I shall refer to 10 Edw. VII. ch. 41, which is a consolidation of chapters 101, 102, 103, and 104 of the R.S.O. 1897. The law, as now in the Consolidated Act of 1910 (Ont.), is, for all the points raised on this motion, the same as in the repealed Acts of R.S.O. 1897. The Sheriff is an officer of the Court—specially mentioned as one of the officers “engaged in the Administration of Justice.” He is an officer of the United Counties and for the United Counties, although appointed by the Province of Ontario. As such, he is entitled to be paid for the services, if rendered, mentioned in ch. 41, 10 Edw. VII.

By sec. 2, the Judges authorised to make Rules under the Judicature Act “may make Rules fixing and determining the fees to be allowed . . . in respect of . . . matters and proceedings . . . relating to the King’s Revenue.” No Rules have been made; so, by sec. 3, the fees in schedule A to the Act shall be the fees in any such “prosecution, matter, or proceeding.”

Item 12 of schedule A is: “Every Annual or General, Return, required by law or by the Government, respecting the Gaol or the Prisoners therein, \$5.00.” That is not in question.

Item 13: "Every other Return made to the Government, \$4.00."

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The charges of the Sheriff, Nos. 1, 2, 3, and 4, were made to the Inspector of Prisons, and upon the Inspector's command.

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The evidence before me in reference to these returns was, that from the office of the Inspector of Prisons and Public Charities for the Province of Ontario forms were sent to the Sheriff, and he was required to make and did make the returns charged for. I think these were returns made to the Government within the meaning of the Act. In the maintenance of prisons and of public charities the revenues are directly concerned.

As to the charge No. 5, it was admitted by the Inspector in his letter of the 27th May, 1909, that, while the information required came from the gaoler and gaol surgeon, yet, "to make it official, it is transmitted through the Sheriff." That, in my opinion, makes it a return made to the Government.

It may be that, because this item 13 in the schedule in ch. 104, R.S.O. 1897, differs from the item in ch. 101, R.S.O. 1897, payment for it cannot be made out of the Consolidated Revenue Fund of the Province.

Item 13 in ch. 101 is: "Every other Return made to the Government." In ch. 104 it is: "Every other Return made to the Government or the Legislature or the Sessions, required by statute or order of the Court."

If the Sheriff did the work, he should be paid for it. Section 14 of ch. 41, 10 Edw. VII., makes that plain: "All fees payable under Part I. to the officers therein mentioned, for services in proceedings in the nature of a civil remedy, for persons at whose instance and for whose private benefit the same are performed, shall be paid by such persons; and . . . all other fees payable to such officers for services connected with the administration of justice or county purposes shall be paid, in the first instance, by the county." I need not further discuss the question of the county being reimbursed.

If the charges are not connected with the administration of justice, they are for county purposes. If the Sheriff is entitled to pay at all, it is to be by the county in the first instance, sub-

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ject to the county being reimbursed if the service is connected with the administration of justice; or, if not, to be payable only by the county; as the case may be.

Then sec. 18 (1) provides: "Subject to the provisions of Part III., all accounts and demands preferred against a county in respect of the administration of criminal justice shall be audited and approved by the Board of Audit hereinafter mentioned."

The word "criminal" is in sec. 18, and not in sec. 14. That, in my opinion, makes no difference. The administration of criminal justice is not merely the apprehension and punishment of criminals, but it has reference to the custody and safe-keeping and maintenance of those charged, or convicted and undergoing sentence.

Part III. of the Act (to which sec. 18 is subject), by sec. 29, provides for the appointment of an auditor of the accounts relating to the administration of justice in the county, for which the Province is liable. No such appointment has been made in the United Counties of Stormont, Dundas, and Glengarry; but, if such an appointment had been made, it would only, as to Sheriff's accounts, relieve the Board of Audit from considering the items of the account belonging to the following classes: (a) offences for which the persons charged were committed or held to bail for trial in the High Court or General Sessions of the Peace; or (b) offences for which the persons charged were convicted before a Police Magistrate under Part XV. of the Criminal Code.

By sec. 31: "All other accounts in connection with the administration of civil or criminal justice which, under Parts I. and II. or otherwise, are payable by the county, shall be audited by the Board of Audit."

Sec. 41 provides that "such of the expenses of the Administration of Criminal Justice as are mentioned in schedule C shall be paid out of the Consolidated Revenue Fund;" and as to that the Government may have an independent Government audit; but the Sheriff is in no way at the present stage a party to any such audit.



If the Sheriff ought to be paid for the items about which the contest has arisen, then a mandamus should issue. There is no other "clear, adequate, effective, and speedy remedy" for him. The Sheriff cannot go to the Provincial Government. See *County of Lambton v. Poussett* (1862), 21 U.C.R. 472. And it is a prerequisite to entitle the Sheriff to sue the county: *Reynolds v. County of Ontario* (1879), 30 C.P. 14.

The account is not payable until audited; but, once audited, it is payable without waiting until the Province pays, where they are liable to pay the county: *In re Sheriff of Lincoln and County of Lincoln* (1873), 34 U.C.R. 1.

It being essential that the account should be audited before payment, the case is distinguishable from *In re Davidson and Chairman of Quarter Sessions of Waterloo* (1864), 24 U.C.R. 66.

In the case of *In re Hamilton v. Harris* (1845), 1 U.C.R. 513, the application was, after audit, for a mandamus to compel the Treasurer to pay. It was held that the Sheriff had other "adequate" remedy.

It may be assumed that the liability of the Crown in the payment of expenses in connection with the administration of criminal justice in the Province, out of Consolidated Revenue Fund, is restricted under R.S.O. 1897, ch. 104, now ch. 41, 10 Edw. VII., to such as are mentioned in the schedule. And, if so, the county is required to pay all proper expenses connected therewith. See *In re Fenton and Board of Audit of County of York* (1880), 31 C.P. 31. In that case, a mandamus was granted to compel the Board to rescind their order for deduction from the account of the County Crown Attorney.

The order for mandamus will go, that, upon the Sheriff of the said United Counties of Stormont, Dundas, and Glengarry presenting his account in due form, as prescribed by law, to the Board of Audit for the said United Counties, the said Board of Audit do audit and certify the items therein mentioned above as Nos. 1, 2, 3, 4, and 5, it being admitted that the services so charged were in fact performed.

There will be no costs. In withholding costs from the Sheriff, his remedy obtained by this motion will not be complete, as the amount involved is comparatively small; but the members of

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the Board of Audit are, for small remuneration, performing a duty to the public, and are acting in good faith, and so should not pay costs. The Counties were not made parties to the motion. Whatever may be the final decision of the Provincial Treasurer as to reimbursing the Counties, the yearly amount is so very small that the counties might well refrain from further litigation about fees for returns apparently necessary, and certainly made by the Sheriff as in duty bound.

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The Board of Audit appealed from the order of BRITTON, J.

November 2. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., RIDDELL and LATCHFORD, JJ.

*J. A. Macintosh*, for the appellants, argued that the fees in question were not properly connected with the administration of criminal justice; and that, if the counties paid them, they could not be repaid the amount under the provisions of the Administration of Justice Expenses Act, 10 Edw. VII. ch. 41 (O.) Reference was made in this connection to secs. 18, 24, and 27 of the Act; also to *In re Fenton and Board of Audit of County of York*, 31 C.P. 31, in which case the Attorney-General for Ontario was notified, and appeared on the argument—a course which should have been followed in the present case.

*R. A. Pringle*, K.C., for the respondent, the Sheriff, argued that the case had been properly decided by the learned Judge in the Court below, and relied upon the reasons given and the authorities cited in his judgment.

*Macintosh*, in reply.

November 25. RIDDELL, J.:—An appeal from the judgment of Mr. Justice Britton.

Mr. Macintosh objected that the Attorney-General should be made a party in the appeal: we thought that, while the Attorney-General was not a necessary party, it would not be improper that he should be notified of the proceedings, as the Court directed in the *Fenton* case, 31 C.P. 31. We accordingly offered the appellants to let the matter stand over to allow such notice to be

given, upon their paying the counsel fee for the day of counsel who had come up to town to argue the appeal. They declined to accede to this proposition, and the argument proceeded.

I see no reason to differ from the judgment appealed from as to the practice—and agree for the reasons Mr. Justice Britton has set out.

*In re Stanton and Board of Audit of County of Elgin* (1883), 3 O.R. 86, is quite different, as is *In re Hamilton v. Harris*, 1 U.C.R. 513.

And, notwithstanding, or perhaps because of, the high and dignified position of the Sheriff or Vice-comes at the common law, he was not by the common law entitled to fees, but must have served the King's writs, etc., without reward: he must have been able to point to some definite statute to entitle him to any fees—and this is still his position; he can claim only such fees as are given him by statute.

The statute now in force is 10 Edw. VII. ch. 41; sec. 3 is the important section: " . . . the table of fees in schedule A shall be the fees to be taken by Sheriffs . . . for the services therein mentioned, in respect of any business transacted by them in any such prosecution, matter, or proceeding, and in proceedings in the County or District Court Judge's Criminal Court and before Coroners, Police Magistrates, and Justices of the Peace." "'Such' prosecution, matter or proceeding," it is argued, must refer to the "prosecutions, matters, and proceedings" previously referred to, i.e., in sec. 2; and these are "criminal prosecutions, matters, and proceedings in the High Court or Court of General Sessions of the Peace, or under any Commission or Special Commission, or relating to the King's Revenue"—it is, however, to be observed that the proceedings, etc. in the County Judge's Criminal Court, etc., mentioned for the first time, are not characterised as "criminal."

The five classes of fees in question are claimed under one or other of the items in schedule A, 12, 13, and 16.

I think the best way to determine the questions in issue is to examine the course of legislation.

There are two series of enactments which throw light upon the meaning of the present statute—in neither series will it be of advantage to go back beyond the statutes I shall mention.

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In 1822 by 2 Geo. IV. ch. 1, sec. 45, the Court of King's Bench were required to fix the fees to be taken by "any Clerk of the Crown, Counsel, Attorney, Sheriff, Officer or other person from or in respect of any business . . . transacted in the Court of King's Bench, as well in civil causes as in criminal prosecutions as in all matters and things, causes and proceedings . . . in the said Court which regards the King's Revenue or under any Commission of Oyer and Terminer and General Gaol Delivery or under any Special Commission of Oyer and Terminer, any former law to the contrary notwithstanding."

Then came (1845) 8 Vict. ch. 38, sec. 1, which, after reciting that certain officers connected with the Administration of Justice in Upper Canada were required to perform services for which no fee was fixed by law, directed the Justices in Quarter Sessions in each district of Upper Canada "to frame a Table of Fees for all services now rendered in the Administration of Justice, and for other district purposes, by any Sheriff, Coroner, Clerk of the Peace, Constable and Crier, which services are not remunerated by any law now in force; and that the . . . Clerks of the Peace shall . . . transmit such Table to the Clerk of the Crown in Toronto, to be by him laid before the Judges of the Court of Queen's Bench at Toronto, and that it shall be lawful for the said Judges in term time, by any Rule or Rules . . . from time to time . . . to appoint the fee which shall be taken and received by such Sheriff . . . for such service as aforesaid."

In Michaelmas Term, 9 Vict., 15th November, 1845, the Court of Queen's Bench made a Rule fixing the fees of officers, etc., accordingly. This I do not find printed in the Upper Canada Reports, as we should expect, but it is referred to in 4 U.C.R. at p. 91. The Sheriff of the City of Toronto has been kind enough to furnish us with a copy of this Rule—it provides that "the fees in the table annexed to this Rule shall be taken and received by Sheriffs, Coroners, Clerks of the Peace, Constables and Criers respectively . . . for services rendered by them respectively in the Administration of Justice and for other district purposes where such services were not remunerated by any law in force."

Two of the items are:—

“Every Annual or General Return required by law or by the Government respecting the gaol or the prisoners therein .....£1.0.0

“Every other return made to the Government or to the Sessions required by statute or by order of the Court 0.5.0”

In the consolidation of 1859, the above statutory provisions appear without change as C.S.U.C. ch. 119, secs. 1, 2.

In Easter Term, 31 Vict., 6th June, 1868, the Courts of Queen’s Bench and Common Pleas amended the Rule of 1845 by striking out all that related to Sheriffs’ fees, and made a new tariff. This will be found printed in 27 U.C.R. pp. 559, sqq., and it was made statutory by 32 Vict. ch. 11.

In this tariff the first item mentioned above in the tariff of 1845 is repeated, *totidem verbis*, with a fee of \$5, and the second appears as two, thus:—

“Every other Return made to the Government....\$4.00

“Every Return to the Sessions required by statute, or by order of the Court ..... 2.00.”

Thus, as early as 1868, the items appear as they are at present.

It will now be of advantage to turn to the other chain of statutes up to this point.

Previously to 1846, the expenses of the Administration of Criminal Justice in Upper Canada had been paid by the district or municipality. In that year, by 9 Vict. ch. 58, it was provided (sec. 1) that “one-third of the expenses of the Administration of Criminal Justice in . . . Upper Canada for . . . 1846 . . . two-thirds . . . of the same for . . . 1847 and . . . for and during each year thereafter, the whole of the said expenses” should be paid out of the Consolidated Revenue Fund; and, by sec. 3, “that the several heads of expense mentioned in the schedule to this Act, shall be deemed expenses of the Administration of Criminal Justice within the meaning of this Act.” In the schedule appear the two items:—

“Every Annual or General Return, required by law, or by the Government, respecting the Gaol or the Prisoners therein—

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"Every other Return made to the Government or to the Sessions, required by statute or by order of the Court"—without mentioning any amount.

It would seem quite clear that, as early as 1845, it was considered that the Government might require returns from the Sheriff respecting the gaol or the prisoners therein; and it is obvious that this last-named Act makes the kinds of returns mentioned part of the administration of criminal justice—giving, as it were, a definition for the expression "criminal justice" wide enough to cover any such return required by the Government.

This legislation goes forward, without change of Act or schedule at the consolidation, into C.S.U.C. ch. 120.

The Judges of the Court of Queen's Bench, in the Rule I have mentioned as passed in 1868, follow the Legislature, and set out in the schedule these items under the heading "Criminal Justice," dividing, however, as we have seen, the latter item into two. The Legislature follows precisely the same course in the Act of 1868, 32 Vict. ch. 11, Ontario statutes 1868-9, p. 42, Caption—"Tariff of Fees—Criminal Justice."

The statute, in the enacting part, says (sec. 2) that these shall be "the fees to be taken by Sheriffs for, or in respect of, any criminal business by them done and transacted in either of the said Courts in criminal prosecutions, and in all matters, causes and proceedings which regard the Queen's revenue, and in all prosecutions, matters and proceedings under any Commission or Court of Oyer and Terminer and General Gaol Delivery, until otherwise provided by the Legislature." Section 3 provides: "The schedule of fees . . . to be taken by Constables, Coroners, Clerks of the Peace and Criers, in respect of any such matters, prosecutions and proceedings, as in the said clauses mentioned, shall remain and continue in force until otherwise provided by the Act of the Legislature."

The former line of legislation continues: R.S.O. 1877, ch. 86 (items unchanged); R.S.O. 1887, ch. 86 (items unchanged); R.S.O. 1897, ch. 104 (items unchanged). While, in the schedules, the items, two in number, read as before, they refer to tariff items in the tariffs now to be considered.

They are the tariffs set out in R.S.O. 1877, ch. 84; R.S.O. 1887, ch. 83; and R.S.O. 1897, ch. 101—being a continuation without change of the former tariff.

I am unable to find anything whatever to indicate that the Legislature intended to change or restrict the meaning of the words "Criminal-Justice" so as now to exclude such reports as we are considering—and I think the interpretation must be as broad now as formerly.

There might be some difficulty in respect of the reports as to lunatics—but it seems clear that "lunatics" are to be considered "prisoners" for the purposes of this tariff.

In 1887, by 50 Vict. ch. 7, sec. 4, the Lieutenant-Governor was authorised to appoint a Sheriff for York and a Sheriff for Toronto; and in the following year, by 51 Vict. ch. 6, sec. 7, the Sheriff of Toronto was declared entitled to the "fees and allowances payable to Sheriffs for services relating to the custody or control of the gaol . . . or to any returns required to be made in respect of the said gaol or of any prisoners or lunatics confined therein . . ."

Now it has been considered that the mistake of Parliament as to existing law does not make the law as Parliament considered it to be—but that rule does not apply to a Parliamentary interpretation of a Parliamentary provision.

The Legislature cannot be considered as intending to play a sorry jest upon the Sheriff of Toronto, by providing that he should be paid the fees payable upon returns as to lunatics confined within the gaol, when there were no fees payable therefor.

The above provision, in substance, still continues to be law: R.S.O. 1897, ch. 17, sec. 8; 9 Edw. VII. ch. 6, sec. 9.

And it is even *à fortiori* by the present statute, 9 Edw. VII. ch. 6; for, in the original statute of 1888, sec. 6 gave the Sheriff of York fees for returns "in respect of any such prisoners," not mentioning lunatics, who were allotted by sec. 7 to the Sheriff of Toronto—this came forward unchanged in the R.S.O. 1897, as sec. 7, but in the Act of 1906, the Sheriff of York is allotted the fees for returns in respect of lunatics committed from the county of York outside Toronto.

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I agree also with the learned Judge appealed from, that any return which, to make it official, is transmitted through the Sheriff, is a return for which the Sheriff is entitled to be paid.

I think, however, that a report required to be made in duplicate is still but one report. A contract in duplicate is but one contract; and I cannot see that making a duplicate statement of the same facts to the same person constitutes a new and distinct report.

The appeal will to this extent be allowed, but otherwise dismissed. The appellants will pay the costs of the appeal.

FALCONBRIDGE, C.J., and LATCHFORD, J., agreed in the result.

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[RIDDELL, J.]

RE J. H.

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Nov. 27

*Will—Construction—Trust for Investment—Powers of Trustees—Nature of Investments—“Securities”—Company Shares—Debentures—Second Mortgages—Foreign Land—Purchase of Land—Direction to Carry on Testator’s Business—Power to Expend Money on Building not Part of Business.*

The testator by his will gave all his estate to his executors and trustees, upon trust to invest, to collect the income and pay it as directed by the will. He empowered them to continue investments existing at the time of his death or to change them from time to time as they might think advisable, and to invest “in such reasonably safe income-producing securities as . . . they may approve without thereby rendering themselves . . . liable for any loss.” The executors were directed, if they thought it advisable, to continue the testator’s business until they should agree that it was advisable to sell it, and were given full discretion as to the time to sell. The widow was also given, during widowhood, the use of the house “and all the household furniture books and other contents of such residence at the time of my death except any money or securities for money there may be therein.” At the date of the will and of the death, the testator had in his house certain scrip representing shares of the stock of banks and other companies and \$3,000 in debentures. He had no other “securities” in his house:—

*Held*, upon a summary application by the executors for an interpretation of the will, as to the powers of investment, that, although “securities,” in its ordinary legal and primary meaning, does not include shares in a joint stock company, it is used colloquially and in business transactions in a sense wide enough to include such shares, and that was the sense in which this testator used the word; and, therefore, the executors had power to invest in shares and debentures similar to those which the testator held at the dates of his will and death.

*Held*, also, as to other proposed investments and expenditures, that a second mortgage is a security, no matter where the land may be, but land



is not; that the direction to carry on the business did not justify spending the money of the estate upon a building which was not part of the business, nor is such a building a "security" such as the testator had at his house.

MOTION by the executors of J. H., deceased, for an order declaring the true interpretation of his will in relation to questions arising in the administration of his estate.

November 25. The motion was heard by RIDDELL, J., in the Weekly Court at Toronto.

C. A. Moss, for the executors.

T. Moss, for a beneficiary.

W. B. Milliken, for another beneficiary.

F. W. Harcourt, K.C., for infants and unborn issue.

November 27. RIDDELL, J.:—The late J. H. died in 1900, having made his last will and testament a short time before; the will was duly admitted to probate.

In and by the will he named certain persons as his "executors and trustees," and to them he devised all his estate upon the following, amongst other, trusts:—

"To invest my said estate as hereinafter directed and collect the income derivable from all my said estate and pay said income" as is particularly directed by the will.

"I empower my personal representatives . . . to continue investments existing at the time of my death or to change them from time to time as they . . . may think advisable. . . ."

"I empower my personal representatives . . . to invest the moneys of my estate including those produced by sale or otherwise in such reasonably safe income-producing securities as . . . they may approve without thereby rendering themselves . . . liable for any loss."

The executors were directed, if they thought advisable so to do, to continue the testator's business until they should agree that it was advisable to sell it, and they were given full discretion as to the time to sell.

The widow was also given, *durante viduitate*, the use of the house "and all the household furniture books and other contents of such residence at the time of my death except any money or securities for money there may be therein."

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Shortly before his death and before his will, J. H. had removed to his house certain scrip which theretofore had been in a safety deposit vault—and this was in the house at the date of the will and of the death. It consisted of bank stock, stock in insurance companies and in a newspaper company, mining stock, stock in manufacturing companies, in the St. George's Hall Company and the Toronto Sanitarium Company, and \$3,000 debentures of the Board of Trade. He had nothing else in the way of "securities" in his house.

The executors are of opinion that it would be for the advantage of the estate to invest in municipal debentures of a British Columbia city, bonds of a packing company in Toronto, debenture stock of the Canadian Northern Railway Company, preferred stock in the Nova Scotia Steel and Coal Company and in certain manufacturing companies, and common stock of the Canadian Pacific Railway Company and of the Pennsylvania Railroad Company. They are also desirous of increasing the building and outbuildings used in the business in Winnipeg. These, however, were leased "by the testator to his business and was used in connection therewith and was not sold as part thereof." The executors believe that by making the said improvements "they can increase the net income received from the building, and that, when thus improved, it would sell more readily and to greater advantage."

The executors also wish to invest moneys in second mortgages on land in Canada and the United States; and in the purchase of land improved and vacant in Canada and the United States.

I ordered that the Official Guardian should represent unborn issue.

The Official Guardian objects, pointing out that interest at a fair rate can now be obtained on unexceptionable security in Canada.

The executors are not petitioning for advice, but asking for an interpretation of the will.

As to the powers of investment, it is clear that "securities" does not include shares in a joint stock company, if the word be used in its ordinary legal and primary meaning. A

"security" is something which makes the payment of money more secure—such "as binds lands or something to be answerable for it: *Ryder v. Bickerton* (1743), 3 Swan. 80n; *Harris v. Harris* (1861), 29 Beav. 107:" *per* Boyd, C., in *Worts v. Worts* (1889), 18 O.R. 332, at p. 341.

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And, in the absence of something in the will modifying the bequest, while "security" would pass stock in the funds (*Bescoby v. Pack* (1823), 1 Sim. & Stu. 500); a vendor's lien (*Callow v. Callow* (1889) 58 L.J. Ch. 698); a paid-up life policy (*Lawrance v. Galsworthy* (1857), 3 Jur. N.S. 1049, *Bank of Montreal v. McTavish* (1867), 13 Gr. 395, *Canadian Mutual Loan and Investment Co. v. Nisbet* (1900), 31 O.R. 562); bills of exchange, promissory notes, etc. (*Barry v. Harding* (1844), 1 Jo. & Lat. 475); it would not pass shares in a company (*Hudleston v. Gouldsbury* (1847), 10 Beav. 547).

But there can be no doubt that the words "security," "securities," "security for money," "securities for money," are used colloquially and in business transactions in a much extended sense. I cannot see, indeed, that the appeal to Murray's New English Dictionary is of advantage to the applicants, the definition relied upon being that *sub voc.* "Security," p. 370, col. 3: "10. A document held by a creditor as guarantee of his right to payment. Hence, any particular kind of stock, shares, or other form of investment guaranteed by such documents." This does not mean that any kind of stock or shares is a security for money—but only that the name is extended in its meaning to such stock, shares, etc., as are secured by what is in reality a "security." But, while "securities" does not, strictly speaking, cover shares in joint stock companies (*Bank of Commerce v. Hart* (1893), 20 L.R.A. 780), it does in its broadest sense (*Thayer v. Wathem* (1897), 44 S.W. Repr. 906, 909).

It is shewn that at the date of the will the testator had no money invested in what are properly speaking "securities," such as municipal debentures, bonds of companies, debenture stocks (except indeed \$3,000 of the debentures of the Board of Trade), and that he was not in the habit of investing his money in such "securities."

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On the whole, it seems to me that the testator called the various stocks, etc., which he removed and had in his house at the time of the will and the death, "securities." He thus makes a dictionary for his will. And I think that the executors have the power to invest, not only in what are really "securities," but also in stocks, etc., similar to the stocks, etc., the testator held at the date of will and death. *In re Rayner*, [1904] 1 Ch. 176, and *Re Johnson* (1903), 89 L.T.R. 84, are in point. (It is, of course, plain that the power is intended to be given to invest in securities beyond those given by the Act; otherwise there would be no need for giving the executors indemnity.)

The answer will be, then, that the executors have the power to invest in the debentures and stock named in the list.

A second mortgage is a security, no matter where the land may be; but land is not.

The building is no part of the business; the direction to carry on the business does not justify spending the money of the estate upon a building no part of the business; nor is such a building a "security" such as the testator had at his house. *In re Gent and Eason's Contract*, [1905] 1 Ch. 386, does not, therefore, apply. The same remark applies to land, either Canadian or foreign.

I am not to be understood as advising the executors to make any such investment as is mentioned above; my advice is not asked—and the executors must use their own judgment *bonâ fide* for the good of the estate.

Nor do I decide what could or would be done in an application in another form.

The order will go in accordance with the above reasons. All parties will have their costs out of the fund to be invested—the executors between solicitor and client—but no costs will be allowed for the affidavit of the solicitor, which simply sets out the safety of the proposed investments; and with that the Court has nothing to do.

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## [DIVISIONAL COURT.]

BATEMAN v. COUNTY OF MIDDLESEX.

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Nov. 27.

*Damages—Personal Injuries—Assessment of Damages by Trial Judge—  
Appeal.*

The judgment of RIDDELL, J., 24 O.L.R. 84, was affirmed.

AN appeal by the defendants from the judgment of RIDDELL, J., 24 O.L.R. 84.

November 27. The appeal was heard by a Divisional Court composed of BOYD, C., LATCHFORD and MIDDLETON, JJ.

Sir *George C. Gibbons*, K.C., and *J. C. Elliott*, for the defendants, contended that the damages awarded by the learned trial Judge were excessive, as was shewn by the evidence of the doctors at the trial.

*T. G. Meredith*, K.C., and *J. M. McEvoy*, by the plaintiff, were not called upon.

The judgment of the Court was delivered, at the close of the argument for the defendants, by BOYD, C.:—The amount awarded is larger than we should have awarded, had the case come before us in the first instance. The Legislature has seen fit to provide that actions of this kind shall be tried by a Judge without a jury; and we must attribute to this assessment of damages as much weight as would be given to the finding of a jury. It is not suggested that the learned Judge acted upon any wrong principle; and the fact that, in his discretion, he has given more, even much more, than we should have given, is not enough to warrant the interference of an appellate Court.

Appeal dismissed without costs.

## [DIVISIONAL COURT.]

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McMANUS v. ROTHSCHILD.

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*Mechanics' Liens—Liability of Owner to Material-man—Building Contract—Contractor Failing to Complete Work in Due Time—Provisions of Contract—Allowance for Delay—Penalty or Liquidated Damages—Extinguishment of Balance Due to Contractor—Claim of Lien—Disallowance.*

A building contract, dated the 29th August, 1910, provided for the payment of \$6,700 in instalments to the contractor after the rate of 80 per cent. of the value of work and material every fourteen days as the work proceeded; also, that time should be of the essence of the contract, and the whole of the premises should be erected and completed internally so as to be in a fit and proper condition for commercial occupation and use within six weeks of the date of the contract, under a penalty of \$20 per day for every day the owner should be denied the full and proper use of the premises; and the contractor specially agreed to pay the owner the said sum of \$20 per day for every day the owner should be denied full possession of the premises, either directly from party to party, or as an allowance from any sum due or to become due to the contractor. The building was not completed within the time agreed, and was never completed by the contractor. The contract-price had not been paid in full for the work done by the contractor:—

*Held*, in an action by a material-man to enforce liens against the land, that, by reason of the penalty mentioned in the contract and the breach of the agreement on the part of the contractor, there was no sum "justly owing" or "payable," within the meaning of the Mechanics' and Wage-Earners' Lien Act, by the defendant the owner to the contractor, and the plaintiff was cut off from any relief under the Act.

*Farrell v. Gallagher* (1911), 23 O.L.R. 130, approved and followed.

*Held*, also, that, notwithstanding the use of the word "penalty," the sum of \$20 a day was really liquidated damages.

Review of the authorities.

*Clydebank Engineering and Shipbuilding Co. v. Don José Ramos Yzquierdo y Castaneda*, [1905] A.C. 6, specially referred to.

Judgment of the Local Judge at North Bay affirmed.

APPEAL by the plaintiff from the judgment of the Local Judge at North Bay in an action to enforce three mechanics' liens.

The defendant Rothschild, a merchant, was the owner of certain land in Cochrane; the defendant Eloy contracted to build upon this land a store in which to carry on the defendant Rothschild's business. The plaintiff was a merchant who supplied certain goods for this building.

The plaintiff filed three mechanics' liens, and proceeded for their enforcement before the Local Judge at North Bay, who gave judgment in favour of the plaintiff as against the defendant Eloy in regard to the amounts of the three liens; but, as against the defendant Rothschild, the learned Judge held that the plaintiff was entitled to the amount of the third lien only.

November 1. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., RIDDELL and LATCHFORD, JJ.

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G. H. Kilmer, K.C., for the plaintiff, argued that the defendant Rothschild had not complied with sec. 12(1) of the Mechanics' and Wage-Earners' Lien Act, by which he is required to retain 20 per cent. of the value of the work done and materials supplied, for thirty days after the completion or abandonment of the contract; and that he was not entitled to set off against this percentage the sums paid to wage-earners and to the plaintiff. The plaintiff's liens are in existence, and the damages claimed by the defendant Rothschild cannot be set off against them; and, even if such damages could be claimed, there is no proof that the defendant Rothschild suffered any in fact. Counsel referred to *Farrell v. Gallagher* (1911), 23 O.L.R. 130, and *Russell v. French* (1897), 28 O.R. 215.

T. P. Galt, K.C., for the defendant Rothschild, relied upon *Farrell v. Gallagher, supra*, which had not been brought to his attention, nor to that of the learned trial Judge, when the case was argued; and, upon the question of whether the sum sought to be set off was in the nature of a penalty or liquidated damages, on *Clydebank Engineering and Shipbuilding Co. v. Don José Ramos Yzquierdo y Castaneda*, [1905] A.C. 6.

Kilmer, in reply, referred to Halsbury's Laws of England, vol. 10, p. 329, where the *Clydebank case, supra*, is discussed.

November 27. RIDDELL, J.:—The building contract is dated the 29th August, 1910, and provides for the payment of \$6,700 in instalments to the contractor after the rate of 80 per cent. of the value of work and material every fourteen days as the work proceeds—then:—

"5. Time shall be the essence of the contract, and the whole of the premises shall be erected and completed internally so as to be in a fit and proper condition for commercial occupation and use within six weeks of the date of this document, under a penalty of \$20 per day for every day the said building owners shall be denied the full and proper use of the said premises."

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"6. Notwithstanding any proviso by law or custom which may be pleaded, the contractor hereby specially agrees with the building owners to pay to them the said sum of \$20 per day (Sabbaths excluded) for every day the building owners shall be denied full possession of the premises, either directly from party to party, or as an allowance from any sum that may be due or that may become due to the said contractor."

The evidence shews that the building was not completed within the time agreed—and, indeed, was never completed by Eloy—he threw up the contract.

The contract-price had not been paid in full for the work done by Eloy.

The following is the state of facts and accounts as found by the trial Judge and not disputed:—

The contract-price for the buildings was..	\$6,700.00
It will cost to complete .....	783.50

Leaving the value of work done.....	\$5,916.50
Of this the owner has paid Eloy.....	\$4,058.97

Leaving apparently due .....	\$1,857.53
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But the owner has also paid

To wage-earners under sec. 15..\$	246.53
To plaintiff .....	1,000.00
	<hr/> 1,246.53

Real balance still in hand .....	\$ 611.00
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The learned Judge then says that, long after the time at which the building should have been finished, the contractor abandoned his contract; and, allowing the owner \$20 per day for this delay, even before (as I understand it) the abandonment of the contract, this sum of \$611 is more than eaten up.

Following *Farrell v. Gallagher*, 23 O.L.R. 130, he holds that there is no sum "justly owing" or "payable" by the owner to the contractor, and dismisses the claim in respect of the two liens in question.

The sole question is, whether the owner of the property, Rothschild, is entitled to say that, by reason of the penalty men-



tioned in the contract and the breach of the agreement on the part of the contractor, there is no sum "justly owing" or "payable" within the meaning of the Act—so as to cut the lien-holder off from any relief under that Act.

The building contract is express that the "penalty" may be "an allowance from any sum that may be due or that may become due to the . . . contractor." If, then, the "penalty" can be exacted at all, it may be, at the option of the owner, deducted from any sum that would otherwise be due, to arrive at the sum actually due.

As we are not bound by the decision in *Farrell v. Gallagher*, I have examined the legislation and the decisions, and find no reason for disputing the correctness of the conclusions in that case.

The question of course arises whether the "penalty" can be exacted by the owner at all.

There is a great deal of law to be found in the books, both in decision and in text—but, in the result, the whole may fairly be expressed as in Halsbury's Laws of England, vol. 10, p. 329, sec. 605:—

"Whether the sum is a penalty or liquidated damages in any given case is a question of construction for the Judge alone: *Sainter v. Ferguson* (1849), 7 C.B. 716; *Magee v. Lavell* (1874), L.R. 9 C.P. 107; *Willson v. Love*, [1896] 1 Q.B. 626, *per* Lord Esher, M.R., at p. 629. In deciding this question he must take into consideration the intention of the parties: *Reynolds v. Bridge* (1856), 6 E. & B. 528; *Dimech v. Corlett* (1858), 12 Moo. P.C.C. 199, 229: as evidenced by their language: *ibid.*; *Lea v. Whitaker* (1872), L.R. 8 C.P. 70, *per* Keating, J., at p. 73: and the circumstances of the case, which, however, must be taken as a whole and viewed as at the time the contract was made: *Public Works Commissioner v. Hills*, [1906] A.C. 368; *Pye v. British Automobile Commercial Syndicate Limited*, [1906] 1 K.B. 425, *per* Bigham, J., at p. 430; compare *Sainter v. Ferguson*, *supra*, *per* Coltman, J., at p. 728.

"The rules for distinguishing between a penalty and liquidated damages are as follows:—

"(1) Where the parties themselves call the sum made payable a penalty, the onus lies on those who seek to shew that it

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is liquidated damages to shew that such was the intention: *Willson v. Love*, [1896] 1 Q.B. 626, *per* Lord Esher, M.R., at p. 630; *Clydebank Engineering and Shipbuilding Co. v. Don José Ramos Yzquierdo y Castaneda*, [1905] A.C. 6; see also *Sainter v. Ferguson*, *supra*; *Parfitt v. Chambre* (1872), L.R. 13 Eq. 36; *Re White and Arthur* (1901), 84 L.T. 594; and compare *Sparrow v. Paris* (1862), 7 H. & N. 594; *Diestal v. Stevenson*, [1906] 2 K.B. 345; . . . *Crisdee v. Bolton* (1827), 3 C. & P. 240, *per* Best, C.J., at p. 243; compare *Barton v. Glover* (1815), Holt (N.P.) 43.

“(2) But though the parties themselves call the sum to be paid liquidated damages, and even if they go so far as to state in the contract that it is not a penalty, this will not prevent the Court in a proper case from holding that it is in fact a penalty: *Kemble v. Farren* (1829), 6 Bing. 141; *Green v. Price* (1845), 8 M. & W. 695, *per* Parke, B., at p. 701, affirmed (1847), 16 M. & W. 346, Ex. Ch.; *Coles v. Sims* (1854), 23 L.J. Ch. 258, C.A.; *Betts v. Burch* (1859), 4 H. & N. 506, *per* Bramwell, B., at p. 511; *Thompson v. Hudson* (1869), L.R. 4 H.L. 1, *per* Lord Westbury, at p. 30; *Magee v. Lavell*, *supra*; *Re Newman, Ex p. Capper* (1876), 4 Ch. D. 724, 731, C.A.; *Clydebank Engineering and Shipbuilding Co. v. Don José Ramos Yzquierdo y Castaneda*, [1905] A.C. 6.”

In the present case it is clear that, while the parties call the money a “penalty,” clause 6 shews that it was, so far as the necessary payment of it was concerned, intended to be, not a penalty, but a liquidated sum.

The evidence plainly shews that the non-completion of the building was a serious loss to the owner, to the amount of at least \$3,000; and it is equally clear that there would be much difficulty, and indeed impossibility, in determining the exact amount of damage—“the damages in their nature are an enigma and incapable of exact calculation.”

I think, on the whole, that, notwithstanding the use of the word “penalty,” this sum is really liquidated damages. The cases nearest to this are perhaps *Duckworth v. Alison* (1836), 1 M. & W. 412; *Errington v. Aynesly* (1788), 2 Bro. C.C. 341; *Bonsall v. Byrne* (1867), Ir. R. 1 C.L. 573; *Law v. Local Board*

of *Redditch*, [1892] 1 Q.B. 127; *Clydebank Engineering and Shipbuilding Co. v. Don José Ramos Yzquierdo y Castaneda*, [1905] A.C. 6.

In the last-mentioned case, it is pointed out that the real question is, "whether this sum of money is one which can be recovered as an agreed sum as damages, or whether . . . it is simply a penalty to be held over to the other party *in terrorem*:" p. 10. "The very reason why the parties do in fact agree to such a stipulation is that sometimes, although undoubtedly there is damage and undoubtedly damages ought to be recovered, the nature of the damage is such that proof of it is extremely complex, difficult, and expensive:" p. 11. "It is obvious on the face of it that the very thing intended to be provided against by this pactional amount of damages is to avoid that kind of minute and somewhat difficult and complex system of examination which would be necessary if you were to attempt to prove the damage:" p. 11.

So, here, if an attempt were made to estimate the damages, the average profits to be made by the owner, the likelihood of his customers being lured away by others, or becoming insolvent, the chance of losing competent help, of bad weather, and a hundred other "minute . . . somewhat difficult and complex" inquiries would require to be made. Who can tell what a merchant may lose by not getting into his shop in time?

I think the appeal must be dismissed with costs.

FALCONBRIDGE, C.J., and LATCHFORD, J., agreed in the result.

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## [DIVISIONAL COURT.]

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*Contract—Interest in Oil Leases—Oral Agreement—Evidence to Establish  
—Finding of Fact by Trial Judge—Reversal on Appeal—Partnership  
—Interest in Land—Statute of Frauds.*

The plaintiff claimed a one-third interest in certain oil leases, made to the defendants H. and P. as lessees; and asked to have these defendants and the defendants W. and R., to whom the leases had been assigned, declared trustees for her as to the one-third interest:—

*Held*, upon the evidence (RIDDELL, J., dissenting), that, according to the agreement of the parties, the plaintiff and the defendants H. and P. were to be jointly and equally interested in the venture and in the leases.

Finding of fact of the Judge of the County Court of Haldimand reversed.

*Held*, also, that the plaintiff was not entitled to any relief against the defendants W. and R.; for, upon the evidence, it was contemplated by all the parties to the agreement that the leases should be disposed of, and that they should share equally in the proceeds of the sale of them; and the full extent of the relief to which the plaintiff was entitled was, to be paid by the defendants H. and P. one-third of the proceeds of the sale made to the other defendants.

*Held*, also, that, though the agreement was not in writing, the Statute of Frauds was not an answer to the plaintiff's claim: there may be an agreement of partnership by parol, notwithstanding that the partnership is intended to deal with land.

*In re De Nicols, De Nicols v. Curlier*, [1900] 2 Ch. 410, and older cases therein cited, followed.

APPEAL by the plaintiff from the judgment of the Judge of the County Court of the County of Haldimand, dismissing the action, after trial without a jury. The action was in the High Court, and was tried by the County Court Judge by consent of the parties.

The plaintiff, a married woman, claimed a one-third interest in certain oil leases, made to the defendants Hill and Paget as lessees; and asked to have these defendants and the defendants Wainnes and Root, to whom the leases had been assigned, declared trustees for her as to the one-third interest. The plaintiff also claimed an account, and \$1,500 as the value of her interest in the leases mentioned in paragraph 6 of the statement of claim, and \$1,000 as the value of her interest in those mentioned in paragraph 9. This was probably intended as an alternative claim, though not so expressed.

The trial Judge held that the plaintiff had failed to establish the agreement under which she claimed an interest; he did not pass upon the defence of the Statute of Frauds, which was raised.

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October 11 and 12. The appeal was heard by MEREDITH, C.J. C.P., TEETZEL and RIDDELL, JJ.

*G. Lynch-Staunton*, K.C., for the plaintiff, argued that the findings of fact of the learned trial Judge were not justified by the evidence, from which it appeared that the plaintiff's testimony as to the contract between the parties was supported by six reputable and disinterested witnesses, and was only met by the denial of the defendant Hill, whom, the Judge says, he "has to believe." The plaintiff's contention was further supported by the fact that her name appeared as a lessee in the first leases prepared by the lessors; and the suggestion that this was done merely to assist her husband in getting work, was improbable and not corroborated by the evidence. The defence based upon the Statute of Frauds has no validity in the case of a partnership such as existed between the parties: *Archibald v. McNerhanie* (1899), 29 S.C.R. 564.

*W. M. Douglas*, K.C., for the defendants Hill and Paget, as to the leases in which the plaintiff's name appeared as a lessee, argued that these were not complete documents, inasmuch as it was intended by the parties that they should be executed by the lessees, and they were cancelled with the consent of the parties, and new leases taken in their place. The learned trial Judge was right in the conclusions at which he arrived, and they should not be disturbed. If the leases were not cancelled, they still exist, and the plaintiff can enforce her rights under them. This is not a case of partnership, and the *Archibald* case does not apply. That case, and the English cases on which it is based, shew the necessity of establishing partnership as a fact, before the benefit of the Statute of Frauds can be claimed by the party who sets it up. Reference was made to *Forster v. Hale* (1800), 5 Ves. 308, cited in *Lindley on Partnership*, 7th ed., p. 95, and to *Isaacs v. Evans*, [1899] W.N. 261.

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*E. Sweet*, for the defendants Waines and Root, adopted the argument made on behalf of the defendants Hill and Paget; and argued that, in any event, his clients were under no liability to the plaintiff.

*Lynch-Staunton*, in reply.

November 30. MEREDITH, C.J.:—The appellant's husband is a driller of oil and gas wells, and she had an outfit for the purposes of that business, which he was ostensibly carrying on for her, under the authority of a power of attorney which she had given him.

The appellant's husband first met the respondents Hill and Paget with two other persons, Birdsall and Ricker, in February, 1911, and agreed with them to sink a gas well on the respondent Paget's property. While engaged in drilling the well, according to his testimony, he recommended Hill to lease a block of land and to drill for oil and gas; and, after various discussions, an agreement was come to between Hill, Paget, and him, that the venture should be entered on, and that Hill, Paget, and the appellant should each be entitled to a one-third interest in it and in the leases which should be obtained. A form of lease had been obtained, and some changes were made in it by Leslie or upon his advice, one of them as to the royalty which the lessor was to receive. This arrangement was entered into probably some time in the latter part of March. An unsigned form of lease, exhibit 2, which is said in the notes of evidence to be signed by Leonard Miller, but is not, was put in; it bears date the      day of April, A.D. 1911, the written part of it is in the handwriting of Paget, and the lessees named in it are John Hill, B. E. Leslie (the appellant), and J. N. Paget.

John Gülck, from whom one of the leases in question was obtained, on the 1st April, 1911, signed one of the printed forms of lease, the blanks of which are filled in, apparently in the handwriting of Paget; and, when signed, the lessees named were John Hill, B. E. Leslie, and J. N. Paget. It appears now with the appellant's name stricken out. It is not executed by the lessees, but, having been executed by Gülck, was delivered by him to Hill. Gülck testified that, when Hill came to him to get this

lease, he said that he, Paget, and the appellant wished to lease his (Gülck's) farm to "set a test well for oil. A new lease from Gülck to Hill and Paget was subsequently prepared and executed; it bears date the 13th April, 1911, and its terms are substantially the same as those of the lease executed by Gülck on the 1st of the same month. According to his account, Hill and a man named Charles Schwalm came to him shortly after the first lease had been executed, when Hill said that he had to change the lease; that he could sell it better without the appellant's name; that Gülck asked him, "What says Mrs. Leslie to that?" to which Hill replied: "Mr. Leslie knows that not just now. We will let him know when we have all the leases changed, it makes no difference if Leslie's name is out, it belongs just as good to him as if his name was in there;" and the appellant's name was then scratched out, and the lease of the 13th April signed.

Another of the leases in question is made by William H. Dilse to Hill and Paget, and it also bears date the 13th April, 1911 (exhibit 5). A previous lease had been executed by Dilse to Hill, the appellant, and Paget, and exhibit 5 was substituted for it, at Paget's request. According to Dilse's testimony, when the first lease was signed Paget told him that he, Hill, and Leslie were going to drill for gas; and the reason assigned for making the change was, that Paget's daughter was a witness to the first lease, and she "did not want to go before a Justice of the Peace; that Schwalm was witness, and he wanted a witness" to the new one. When the new lease was read over, Dilse noticed that the appellant's name was "left out," and asked the reason, and was told that the appellant was involved.

Another of the leases is made by Thomas Finch to Hill and Paget, and it also bears date the 13th April, 1911 (exhibit 6). A previous lease had been executed by Finch to Hill, the appellant, and Paget, and was obtained by Hill. According to Finch's testimony, Hill then told him that he and the appellant and Paget were going to get up a local company, consisting of himself, Paget, and Leslie, and to get the farmers to go in with them and make a test well for oil; that Schwalm brought the second lease to him; and that Hill gave as the reason for the change that he wanted it "because the farmers didn't want to sign the lease

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because Mrs. Leslie did not own anything, and they would not sign for fear they would get into trouble;" and, according to this witness's testimony, Hill told him, when the first lease was got, that they were to take equal shares. On his cross-examination, Finch said that Hill was not present when the second lease was signed; and it is probable that the statement which he attributed to Hill he intended to say was made by Schwalm.

Another of the leases is made by George E. Bloomfield to Hill and Paget, and it also bears date the 13th April, 1911 (exhibit 7). According to his testimony, he was first spoken to about the lease by Leslie; and, when the lease was executed, Hill told him that "Leslie was in this, but being it was his wife, a good many did not want to deal with a lease with a woman's name on, and they dropped it;" and that "Leslie was in for it, whatever they sell for, Mr. Leslie will have his third."

Another witness, Robert E. Johnson, testified that Hill told him that when they found out Mr. Leslie's circumstances they had to drop his name, but he would get his third just the same.

Gülck's evidence is corroborated by his wife as to what took place when the second lease was executed.

Upon his examination for discovery, the respondent Hill admitted that, in addition to those taken from Gülck, Dilse, and Finch, three of the other leases, those from Edward Brooks, George Brooks, and Jantzi, were at first made to himself, the appellant, and Paget, and being asked, "How did you come to take her name off? (Q. 18), replied: "I met Mr. Paget, and he said we had better take new leases, and not take Mrs. Leslie's name, as she was involved in this drilling outfit, and we might get into trouble; so Mr. Paget told me to see Mr. Leslie the next day, but I did not see him till later."

The position taken by the respondents Hill and Paget is, that the appellant had and has no interest in the leases, and that those that were originally taken in the name of the three were so taken to secure Leslie "work on the leases;" and they also say that, after they had decided that his wife's name should not appear in the leases, Leslie assented to the course they were taking.



In his examination in chief, referring to the occasion when whatever arrangement was made as to taking the leases was entered into, Paget's account of what took place and led to the appellant's name being included in the leases which were first taken was this: that, upon Leslie saying, "There is just one thing to this. You have led me to believe there was a number of gas wells to be put down, and if you lease these lands and dispose of the leases I might be out of a job"—Hill replied, "That is not our intention. Our intention is to give you the drilling of the oil well. You said you could dig a deep well with very little extra expense, and you will get work whether we form a company or dispose of the leases. Our object is, that you are not to be out of a job"—adding, "What is the matter with putting your name in with ours? It might help in getting work if your name was in the leases;" that he (Paget) said that he did not see what benefit there would be in that, as Leslie owned nothing in his own right, and it might lead to trouble; to which Hill replied that the appellant's name might go in, that her name was on their contracts for drilling; that he consented to her name being put in, but "with the distinct understanding that Mr. Leslie had no interest whatever other than to secure him work on the leases taken," and that that was "an express understanding" (pp. 57, 58).

It will be observed that Paget does not say that the appellant had no interest, but that "Mr. Leslie" had no interest, etc. This seems to me not at all inconsistent with the intention being that the appellant was to have the one-third interest which the leases they were about to obtain indicated, *primâ facie* at all events, was her interest in them. What he was anxious to avoid was the name of the husband appearing, on account of his owning nothing in his own right and the fear that that might lead to trouble.

What is relied on, in part at least, as proving that Leslie assented to the change is thus detailed by Paget: "I asked Mr. Leslie if he had seen Mr. Hill to-day. He said he had not. I said, Mr. Hill and I decided on Saturday that we would not take any further leases having Mrs. Leslie's name on them, and we would take new leases for those that had her name on. I had

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heard she was involved. Mr. Leslie said it was not necessary to him, and he said; 'In fact, I thought you had left it off when you didn't come round to ask Mrs. Leslie or I to sign; what I want is work' " (p. 60).

Paget also assumed to give a categorical denial to Leslie's statement that the arrangement was that Hill, the appellant, and Paget were to be equally interested in the leases; but it will be observed that that is not the denial he makes, but a denial that it was understood that Hill, Leslie, and himself were to share equally in the leases.

On Paget's examination for discovery, the account he gave as to the way in which the appellant's name came to be in the lease differs from that given at the trial. When examined for discovery, he said nothing about the distinct or express understanding which he deposed to at the trial, to which I have already referred.

The respondent Waines testified, and he was corroborated in this by his stenographer Helena Cleary, that Leslie saw him after he had obtained an option for the purchase of the leases, and was seemingly under the impression that the purchase had been closed, and wanted to know if he could get a contract for drilling; but I see nothing in this inconsistent with the contention that the appellant was entitled to a one-third interest in the leases.

Mary Lymburner, a daughter of Paget, testified that she was present when the conversation as to leaving the appellant's name out of the leases spoken of by her father took place. Her account of the conversation is, that Paget asked Leslie if Mr. Hill had seen him, and told him it was wiser to leave Mrs. Leslie's name off the leases, and he said "no," and that her father then said that they had thought it was wiser, and that Leslie said it was all right; all he was anxious about was to get work;" and that Leslie also said he knew "they had not been asked to sign any leases up to this time, but he supposed possibly he had thought it wiser to leave her name off the lease" (p. 78).

Two observations occur to me as to this testimony. It is not inconsistent with the claim which the appellant makes, and it

differs from Paget's testimony. She says that Leslie said "it was all right." In the father's account of the conversation that expression has no place, and there are other differences between them. When cross-examined, she puts the consent even stronger: "He (Leslie) said he would be satisfied to leave her name off the leases, that he supposed something of that kind had been done because they did not ask them to sign the leases."

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The respondent Hill, in his examination in chief, corroborated in general terms the testimony of Paget as to what occurred at the meeting when the arrangement as to getting the leases was made, and testified that nothing was said about giving Leslie or his wife an interest in the leases.

He also testified that he saw Leslie the day after the conversation of which Mrs. Lymburner spoke, and that he told Leslie that Paget said "to tell them that we are not going to take any more leases with her name in, but get new leases for the old ones, as Mr. Paget said she was involved in the derrick, and we might have trouble;" and that Leslie replied that Paget had told him that the night before, and it was all right.

Hill also denied that he told Bloomfield that Leslie was to get a third share of whatever was sold, although he admitted that he had had an interview with Bloomfield. He also denied that he told Johnson that Leslie was to get a third in whatever was sold, although he admitted that he had had an interview with Johnson. He also denied that he had told Gülck that "you were to have equal shares;" and he testified that he told Leslie of the option that had been given to Waines, that Leslie asked "how much," and that he had replied "about 2000," and that Leslie made no objection.

On cross-examination, Hill said that he thought that "all those witnesses," referring to the witnesses called on the part of the appellant, "were reputable, respectable farmers."

Schwalm was also called as a witness, and denied that Hill had said to Gülck, when the second lease was obtained, that Leslie would get his interest or share just the same, and he also denied that, at Dilse's, Paget had said that his daughter did not want to go before Mr. Teeft to make the affidavit.

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It is somewhat strange that there should be this latter denial, in the face of Paget's testimony: "Mr. Schwalm and I went up there. I told him the reason Mr. Schwalm was witness was, that he had witnessed nearly all the leases we had taken, and my daughter only one; and his signing as witness would avoid her going before a Justice of the Peace to make an affidavit."

There is no denial, either by Hill or by Schwalm, of Finch's testimony as to the reason given for wanting the change in his lease, "that the farmers did not want to sign because Mrs. Leslie didn't own anything and they would not sign for fear they would get into trouble."

In the absence of any denial, it must be taken that this testimony of Finch was true; and, if that be so, it follows that the reason given for the change was a fabricated one, for there is not a suggestion in the evidence of Hill or Paget that any difficulty had been found in getting leases because the appellant's name was in them. This appears to me to be a suspicious circumstance; and, because of it, the same credit cannot be given to Hill's testimony as it might otherwise have been entitled to.

I have as yet not referred to the testimony of Roy Leslie, a son of the appellant, that he was present at a conversation between Paget and Leslie in which Paget asked Leslie the value of the leases; and, on his replying that they were worth from \$7,000 to \$10,000, Paget said, if he got \$3,000—\$1,000 apiece—they ought to be satisfied, and Leslie rejoined that he didn't want to give it away. This conversation is denied by Paget, but the son's testimony as to it is corroborated by his father.

The learned trial Judge in his reasons for judgment says:—

"I cannot think the agreement was as plaintiff claims; and, although a number of persons have sworn that Hill, not Paget, had told them plaintiff had a one-third interest, still Hill denies that he ever made such a statement to any one, and I suppose I am bound to accept his denial.

"As, in my view, plaintiff fails to establish the agreement she sets up, it is unnecessary to go into the defence of the Statute of Frauds. Action dismissed."

Since the argument, at the request of the Court for a statement of his reasons for saying that he supposed he was bound to accept Hill's denial, the learned Judge has made the following statement:—

“From memory I cannot quite recall the reason why I felt bound to accept Hill's denial.

“I accepted Paget's statement of the transaction in preference to Leslie's, and Hill's evidence in Court seemed to me to agree with Paget's statement.

“Some of the plaintiff's witnesses had sworn that Hill had stated that the plaintiff was entitled to a one-third interest in the leases taken, but Hill denied making such statement to any one. It seemed to me it was his word against theirs, and I felt, I suppose, that the witnesses might have been mistaken rather than that I disbelieved them.”

I am unable to agree with the finding of fact of the learned Judge. The evidence, in my opinion, very much preponderated in favour of the appellant's contention that the agreement was, that she was to be entitled to a one-third interest in the venture which was being embarked upon and in the leases which should be obtained.

The testimony of the four lessors from whom leases were at first taken, with the name of the appellant as one of the lessees, Gülek, Dilse, Finch, and Bloomfield, and of Robert E. Johnson, affords strong corroboration of the testimony of Leslie; they are, according to the admission of the respondent Hill, “respectable, reputable farmers;” and their testimony is not open to the same criticism as that to which testimony as to conversations is properly subjected. They were interested in the matters as to which they testify; and it is more than probable that the nature of the venture in connection with which the leases were obtained was the subject of discussion when the first leases were executed, and the reasons for the change the subject of discussion when the new leases were obtained.

These witnesses are, as I have said, on the respondent Hill's admission, reputable, respectable farmers, and they have no interest in the question between the parties; and I am unable to understand why, because of the bald denial by Hill, unsatis-

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factory in my opinion as it was, the learned Judge came to the conclusion that "they might have been mistaken," though he did not disbelieve them.

The fact that the name of the appellant appeared in the leases as first prepared and executed by the lessors, strongly supports her contention, and the theory that the appellant's name was included not because she had any interest in the leases, but to assist her husband in getting work, if the leases were disposed of, which the learned Judge accepted, is, in my opinion, an improbable one, and so much out of the ordinary course of things that it would require corroboration to warrant its being accepted; and of corroboration there is none; but there is a body of testimony which, if true, is quite inconsistent with it.

I would reverse the finding of fact, and substitute for it a finding that, according to the agreement of the parties, the appellant and the respondents Hill and Paget were to be jointly and equally interested in the venture and in the leases that were obtained.

If the appellant is entitled to enforce this agreement, notwithstanding the defence based on the Statute of Frauds, she is not, in my opinion, entitled to any relief against the respondents Waines and Root.

My conclusion upon the evidence is, that it was contemplated by all the parties to the agreement that the leases should be disposed of, and that they should share equally in the proceeds of the sale of them; and the full extent of the relief to which, on the hypothesis I have mentioned, the appellant is entitled, is to be paid, by the respondents Hill and Paget, one-third of the proceeds of the sale to the other respondents.

There remains to be considered the effect of the Statute of Frauds.

In *In re De Nicols, De Nicols v. Curlier*, [1900] 2 Ch. 410, Kekewich, J., says (pp. 416-7): "It is settled that there may be an agreement of partnership by parol, notwithstanding that the partnership is intended to deal with land, and that to an action to enforce such agreement the plea of the Statute of Frauds will not avail. In such an action, therefore, the rights of the parties to the land, their respective interests in it, and their mutual

obligations respecting it, may and must be determined and enforced notwithstanding that there has been no compliance with the statutory provision. The authorities for this are not numerous, but they are conclusive—namely, *Forster v. Hale* (1798), 3 Ves. 695; *S.C.* (1800), 5 Ves. 308; and *Dale v. Hamilton* (1846), 5 Hare 369, (1847), 2 Ph. 266. In the latter case, Wigram, V.-C., applied this ruling to a case where the partnership was intended to deal exclusively with land. Lord Lindley, in his work on Partnership, 6th ed., p. 89, says that the latter case goes a long way towards repealing the Statute of Frauds, and that it is difficult to reconcile it with sound principle or the more recent decision of *Caddick v. Skidmore* (1857), 2 DeG. & J. 52. This is a strong adverse comment, but yet I am bound to treat the decision as sound, and I did so in *Gray v. Smith* (1889), 43 Ch. D. 208. Whether it is competent for the Court of Appeal now to disturb the ruling above quoted, or whether being competent the Court would be willing to do so, is not for me to say; but at any rate I must take the ruling to be established.”

In the 7th edition of Lindley on Partnership, p. 97, it is said, referring to this ruling: “In the absence, however, of any decision of the Court of Appeal to the contrary, the law on the point now under discussion must be taken to have been correctly stated in *Forster v. Hale* and *Dale v. Hamilton*, which have been treated as binding authorities in the most recent cases,” referring to *Gray v. Smith* and *In re De Nichols*, *De Nichols v. Curlier*.

This paragraph does not appear in the earlier edition, and has been added since these cases were decided.

My conclusion is, that, following these cases, we must hold that the Statute of Frauds is not an answer to the appellant's claim.

I would, therefore, reverse the judgment appealed from, so far as it dismisses the action against the respondents Hill and Paget, and substitute for it a judgment declaring that the appellant is entitled to one-third of the proceeds of sale of the leases to the respondents Waines and Root, and for an account (if the parties do not agree as to the amount), and to judgment for the one-third with costs; and dismiss the appeal against the judgment in favour of the respondents Waines and Root; and I would not give costs of the appeal to any of the parties.

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TEETZEL, J.:—I agree with the judgment of the learned Chief Justice, and have only to add that I think the learned trial Judge, in accepting the evidence of Paget and Hill upon what they alleged to be the sole object of putting Mrs. Leslie's name in the leases, could not have had in mind the fact that, for the purpose of accomplishing that object, they were adopting not only a very absurd method, but one which, as men of intelligence and of more than ordinary business experience, they must have known was giving to her, clearly and unequivocally upon the face of the leases, rights and interests in common with them as a lessee, or the fact that the evidence to contradict the plain meaning and effect of the leases and to warrant a judgment to deprive her of the rights, should be as clear and convincing as would be required in an action to reform the leases by striking her name out as one of the lessees.

It is not conceivable to me that, in an action to reform the leases in the manner suggested, with all the parties present, any Court would, upon such evidence of alleged mistake as that adduced here, adjudge that the leases should be reformed by striking out Mrs. Leslie's name as a lessee.

The leases with her name as one of the lessees were deliberately prepared by either Paget or Hill, and it was not until after six of them were executed by the lessors, and after they heard she was financially involved in some way, that it occurred to them to strike it out.

If this, supported by the evidence of the plaintiff, was not enough to displace any claim of mutual mistake, it is hard to conjecture what in any case would be enough.

I think it is generally found that a salutary rule in weighing evidence is to give more effect to a person's deliberate acts before a dispute arises, which are consistent with his opponent's claim, than to evidence given by him after the dispute arises in support of a position inconsistent with the claim and inconsistent with the *primâ facie* effect of his acts. In other words, a person's unequivocal acts before a dispute arises are generally better evidence of his real attitude towards the matters in controversy than is his testimony at a trial supporting an inconsistent attitude.



I also think that the learned Judge failed properly to weigh the conflicting evidence of four disinterested and admittedly reputable witnesses, upon a matter pertinent to the vital question in the case, as against Hill's denial. Their evidence was consistent with, while Hill's was inconsistent with, the *prima facie* case made by the acts of Hill and Paget in having the six leases executed by the lessors with Mrs. Leslie's name in as lessee.

I think that, under these circumstances and in the absence of anything to discredit any of those witnesses, or to shew that the memory of any of them was unreliable, their evidence and not Hill's should have been accepted.

It is not suggested that the learned trial Judge in finding that Hill's evidence should be credited was affected by the manner and demeanour of any of the witnesses who appeared before him. So that, in determining this appeal, we are not embarrassed by the objection which frequently arises when the conclusion of the trial Judge upon the credibility of a witness turns on manner and demeanour; and, consequently, if we are convinced, as we are, that the trial Judge has erred in failing to give due effect to strongly preponderating evidence against the respondents Paget and Hill, or that he has misapprehended the effect of such evidence, it is our duty to reverse his findings and direct the proper judgment to be entered.

In this respect the rule adopted in *Coghlan v. Cumberland*, [1898] 1 Ch. 704, and *Beal v. Michigan Central R.R. Co.* (1909), 19 O.L.R. 502, applies.

RIDDELL, J.:—The Courts have a strong disinclination to set aside a finding of fact which has been made by a tribunal having the advantage of seeing the witnesses. I cannot agree with my brethren that this is a case for reversal—but, it being a case of fact and not of law, no good end would be attained by my giving an elaborate judgment.

I would dismiss the appeal with costs.

*Appeal allowed as against the defendants Hill and Paget; RIDDELL, J., dissenting.*

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## [IN THE COURT OF APPEAL.]

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JONES v. TORONTO AND YORK RADIAL R.W. CO.

Nov. 30.

*Street Railways—Injury to Person Crossing Track—Negligence—Contributory Negligence—Ultimate Negligence—Findings of Jury.*

*Held*, reversing the judgment of a Divisional Court, 23 O.L.R. 331, that there was no reasonable evidence to support such of the findings of the jury as were in favour of the plaintiff; and the action was properly dismissed by RIDDELL, J.

AN appeal by the defendants from the order of a Divisional Court, reversing the judgment of RIDDELL, J., at the trial, in favour of the defendants, and directing judgment to be entered for the plaintiff upon the findings of a jury. The reasons for judgment of RIDDELL, J., and of the Judges in the Divisional Court are reported in 23 O.L.R. 331.

September 20. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

C. A. Moss, for the defendants, argued that the judgment of the trial Judge, dismissing the action, was properly based upon the answers of the jury; and, even if this was not the case, he was justified in finding that there was no evidence upon which the findings of the jury against the defendants could be made. In actions of this kind, it is the province of the jury to find the facts, and that of the Court to apply the law to the facts as found. In this case, however, the Divisional Court have practically permitted the jury to find the law in defiance of the facts. He referred to *Fewings v. Grand Trunk R.W. Co.* (1909), 1 O.W.N. 1; and relied upon the reasons of the learned trial Judge and the authorities cited by him, and also upon those referred to by the learned Judges in the Divisional Court, who, as it was submitted, were in error in their application of these cases in favour of the plaintiff.

John MacGregor, for the plaintiff, argued that the answers of the jury amounted to a clear finding of negligence on the part of the defendants; and, even if this were not the case, or if their answers should be considered contradictory or unintelligible, that would only be a ground for a new trial, which is not asked here.

He referred to *Forwood v. City of Toronto* (1892), 22 O.R. 351; *Davies v. Mann* (1842), 10 M. & W. 546; *Rowan v. Toronto R.W. Co.* (1899), 29 S.C.R. 717; *Sim v. City of Port Arthur* (1911), 2 O.W.N. 864; *Radley v. London and North Western R.W. Co.* (1876), 1 App. Cas. 754; *Badgeley v. Grand Trunk R.W. Co.* (1909), 14 O.W.R. 425; and other cases cited by him in his previous argument before the Divisional Court, 23 O.L.R. 331, at pp. 335, 336.

*Moss*, in reply.

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November 30. GARROW, J.A.:—The case is in this Court for the second time. When here last, the occasion was an appeal from the judgment of a Divisional Court directing a new trial, which judgment this Court affirmed: see 21 O.L.R. 421.

The case has since been tried a second time, before Riddell, J., who, after submitting questions to the jury, dismissed the action.

The questions, with their answers, were as follows:—

“(1) Q. Was there any negligence on the part of the defendants which caused or helped to cause the collision? A. Yes.

“(2) Q. If so, what was the negligence (answer fully)? A. We find with the evidence given that the car should have been stopped in a shorter distance.

“(3) Q. Was there any negligence on the part of the plaintiff which caused or helped to cause the collision? A. Yes.

“(4) Q. If so, what was the negligence (answer fully)? A. Might have exercised a little more care.

“(5) Q. Notwithstanding the negligence (if any) of the plaintiff, could the defendants, by the exercise of reasonable care, have prevented the collision? A. Yes.

“(6) Q. If so, what should they have done which they did not do, or have left undone which they did (answer fully)? A. He should have seen the man sooner and sounded his gong continuously.

“(7) Q. If the Court should, upon your answers, think the plaintiff entitled to damages, what sum do you propose as damages? A. \$1,200.”

The point of view of Riddell, J., is well expressed, I think, in the following extract from his judgment:—

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"I do not think that there is any evidence upon which the jury could properly find as they have done as against the defendants; but, assuming that the findings can be supported, it is apparent, I think, that all the acts of negligence found against them were of such a character that the jury might have found them as primary negligence. Then the contributory negligence found took place at the same time as the negligences of the defendants—it was not followed by any act of negligence on the part of the defendants either in point of time or logically. The negligence of the plaintiff was a contributory act up to the very instant of the accident—and, consequently, the accident was caused by concurrent negligence of both parties." And he evidently founded his conclusions in law upon such cases as *Reynolds v. Thomas Tilling Limited* (1903), 19 Times L.R. 539, affirmed in (1903), 20 Times L.R. 57, to which he referred at some length. And, if the facts really were as he assumed them to be, no one could, I think, quarrel with the law as applied by him, which indeed might be called elementary, namely, that where there is negligence on one side and concurrent negligence on the other, both continuing down to and contributing to cause the injurious act complained of, there can be no recovery.

The Divisional Court, however, held that the case was really one, not of primary, but of secondary negligence, in not avoiding the consequences of the plaintiff's prior negligence, and fell within the principle as to such negligence laid down in *Radley v. London and North Western R.W. Co.*, 1 App. Cas. 754; and, reversing the judgment of Riddell, J., gave judgment for the plaintiff for the amount found by the jury.

The real difficulty in the case is, in my opinion, due, not to any doubt about the law, which is fairly well settled as to both classes of negligence, but about the facts.

The plaintiff, by his pleadings, alleged two and only two acts of negligence, namely, excessive speed and failure to warn, both of which were negatived by the findings of the jury, and quite properly so, on the evidence.

There was no specific allegation of any act of negligence occurring after the plaintiff had shewn that he intended to cross

the track; but the learned trial Judge, without objection, submitted that question also to the jury in these words: "Was there anything which the railway could have done, notwithstanding the carelessness on the part of the plaintiff, if he was careless, to have prevented the accident?" having previously pointed out that it was the duty of the motorman to keep a look-out, in these words: "It is the duty of the motorman to keep a look-out, a reasonable look-out. . . . A motorman, seeing a person approaching a track, has a right to believe that the man will use ordinary prudence, and *if there is nothing to indicate* that the man is going to cross the track in the face of his car, then you will ask yourselves whether the motorman is called upon in the exercise of reasonable care to suppose that that man is going to be fool enough to walk in front of his car. And is there any evidence here that this motorman ought to have seen that this man was going to walk in front of his car?" And it is evidently to this phase of the case, in other words, to the secondary rather than to the primary negligence, which they negatived, that the jury intended their second and sixth answers to apply. I, therefore, agree with the view of the learned Chancellor in the Divisional Court, that, if the plaintiff is entitled to recover at all, it can only be in respect of negligent acts occurring after the plaintiff's own negligence became apparent.

These answers (2nd and 6th) contain three elements: (1) the motorman should have seen the plaintiff sooner; (2) he should have stopped the car sooner; and (3) he should have rung the gong continuously.

The question of the gong may be at once dismissed. The evidence is overwhelmingly against the idea that any amount of ringing would have prevented the accident; and, if it would not have done that, its omission cannot be said to have in any way caused or contributed to the accident. The unfortunate plaintiff is shewn to be very deaf. There is no dispute about the fact that the gong was rung, and rung violently, immediately before he stepped on the track, and when he was only a few feet distant, and that he did not hear it. Nor did he hear the shouts of warning addressed to him at about the same time, circumstances which clearly shew the inconclusiveness, and I had almost said the absurdity, of this particular finding.

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The real point in the case arises, in my opinion, wholly upon the other two, which, notwithstanding their lack of definiteness, I assume to be sufficiently in the plaintiff's favour to support the judgment which he now has. And the question to be determined is, was there reasonable evidence proper for the jury to justify such findings?

The burden of proof was, of course, upon the plaintiff. He was bound to incline the balance in his favour by something more than a mere scintilla of evidence. There must be reasonable evidence; such evidence as would justify reasonable men in coming to the conclusion that it was within the power of the motorman, after he saw, or should have seen, that the plaintiff probably intended to cross the track in front of the car, to have stayed his advance and thus prevented the accident. And such evidence, after a careful and indeed anxious consideration of the evidence, I am quite unable to find.

About the plaintiff's own negligence there can, under the circumstances, be no doubt whatever, notwithstanding the exceedingly mild yet sufficient terms in which it is expressed in the 4th answer. He was so deaf that he could not trust his ears for defence; and he seems, upon the evidence, to have utterly failed to use his eyes, but kept them, as the witnesses say, turned upon the ground, or, as he says, looking only in the wrong direction, namely, towards the south, when he should have kept a look-out both ways. From where he commenced to cross the street to the track is said to be about 40 to 45 feet on the oblique course which he took. He was going, I will assume, at his usual pace, which may be put at three miles an hour, although one of the witnesses, John Cudmore, says he was apparently running. And at that pace he would traverse the 45 feet in about 10 seconds. The motorman says he saw him for the first time when from 4 to 8 feet from the track. It is not suggested that he did not at once do what he could to stop the car then. He at once sounded the gong violently, shouted to the plaintiff, and applied the reverse. The car was equipped only with hand-brakes, and not with air; but no point is made apparently of faulty equipment.

What is said is, that the motorman should have seen him sooner; but the point at which he should have seen him is not

determined, as it was in the somewhat similar case which came to this Court and afterwards went to the Supreme Court, of *O'Leary v. Ottawa Electric R.W. Co.* (1908), partially reported in 12 O.W.R. 469. How much sooner in the plaintiff's progress toward the track should the motorman have seen him? Clearly only at the point at which it became reasonably apparent that the plaintiff intended to proceed in his course across the track. It was broad daylight. The plaintiff, to outward seeming, was a sober, capable man, in possession of his senses. The car was easily within his line of vision; and, if he had had ordinary hearing, he could have heard as well as seen it. It is no unusual thing, as every one knows, for one desiring to cross, to approach quite near the track and there await the passing of a car. What was there to shew that the plaintiff intended to pursue a different course, under such obvious circumstances? Nothing, apparently, except the circumstance that in advancing he was apparently not looking towards the car but towards the ground, or the west, or the south, as different witnesses say. But it did not follow that he had not looked earlier and was quite aware of the approaching car; indeed, his failure to look north when near the track pointed quite as much to that as to anything else. So that it is exceedingly difficult to see how the motorman can be blamed in proceeding as he did until he actually saw the plaintiff a few feet away, and still advancing, when he gave an alarm by gong and voice which would have stayed any one but one so deaf as the plaintiff was, and otherwise did all he could to prevent the collision.

The fact is, that the evidence puts the plaintiff very much in the position of the man referred to by Lord Cairns in *Dublin Wicklow and Wexford R.W. Co. v. Slattery* (1878), 3 App. Cas. 1155, at p. 1166, as one who should fairly be regarded as the sole author of his unfortunate injury, by running into the car rather than having it run into him.

I would allow the appeal and dismiss the action, both with costs.

MEREDITH, J.A.:—The dismissal of this action, at the trial, was, in my opinion, right; and the judgment of the Divisional Court erroneous; which I think can be demonstrated.

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No reasonable fault can be found with the expressions of opinion, given in the Divisional Court, as to the duty of persons operating a railway along the surface of a public road; but fault should be found, I think, with the failure to give expression to the corresponding duty of others also using the highway, for the expressions, as to the duty of the railway company, apply at least equally to all persons making use of such a road; care is as much the duty of the one as the other; and the common expression, the greater the danger the greater the care, applies, not to one side alone, but to all alike; and I am quite unable to agree in the proposition that all persons have a right equal to that of the railway company to occupy 'that part of the highway where the company's tracks are laid; that would render the purpose of such railway—rapid transportation—unattainable, and would be opposed to the natural law of self-preservation; if one on foot, or in a vehicle, or otherwise, making lawful use of the highway, could saunter at will across or along the tracks, obliging the drivers of the company's cars to be constantly stopping or slowing down to avoid any infringement of such rights, rapid transit would be impossible, the purposes of the railway would be practically destroyed. The very necessity of the thing requires that the company's cars should have the right of way, and that those driving, or walking, along the tracks, or even crossing them only, should take reasonable care to clear the way for the passage of the cars. One on foot can stop, or turn in any direction, almost instantaneously; and any one driving can do so speedily; but not so with the cars, they cannot move except upon the rails, they can but go ahead or back up on them; and it takes some time to stop them, and a longer time to reverse their movement. It would reduce to a farce the railway service, for the benefit of the public, if the right of way were not accorded to the cars; which, as I have before mentioned, the law of self-preservation makes necessary. Such a right of way is in fact provided for in the provincial enactment respecting electric railways: see R.S.O. 1897, ch. 209, sec. 40.

It is, of course, only natural that Judges and jurors should acquire one-sided views respecting such matters as those in



question in this action; we have only one-sided experiences of them; daily we suffer more or less the inconvenience of rapid transit cars running on the surface of the highway; few, if any, of us have had any kind of experience from the other point of view; indeed, one might reasonably think that no one should be deemed qualified to try such a case as this, or sit in appeal from one who has tried it, without having had, at the very least, the experience gained by accompanying the driver of a car through his whole route. What can one who has never had even that fleeting experience, or perhaps has never even driven a horse through a crowded street, really know about such things? We may "bless" the drivers of cars frequently, but how much better reason have the drivers of cars, more frequently and more fervently, to "bless" us. I shall certainly try to remember my shortcoming in these respects in dealing with this case; to look at it, as well as I can, from both points of view.

The facts are simple, and there can be no serious doubt as to them. The plaintiff, a deaf man, proceeded to cross the defendants' railway track, with his head down, and without looking either way for any cars that might endanger his passage over the track. He and his two sons testified that, before he started to cross the road, he and they looked and saw the car which caused his injury standing at the siding above Balliol street, where cars going in opposite directions usually passed one another, the defendants' track being a single one; the siding is 550 feet from the place of the accident; it is put beyond any question that the car, after leaving the siding, stopped at Balliol street to take on a passenger, and was to stop at the next street to take on passengers who were awaiting it and because it was a regular stopping place, and so necessarily was proceeding at a moderate rate of speed when the collision between man and car occurred. It, therefore, follows that, if the plaintiff, or his sons, saw the car standing at the siding, they must have looked some time before the plaintiff proceeded to cross the street. It is quite out of the question that the car could have come from the siding, and have stopped at Balliol street, whilst the plaintiff was crossing the street only. It is, therefore, very plain that the jury were right in finding the plaintiff guilty of contributory negligence; if they

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had found otherwise, there would, in my opinion, have been no reasonable evidence to support their finding.

The specific grounds of action alleged by the plaintiff in his statement of claim were excessive speed and failure to sound the gong; but the evidence was overwhelmingly against him in these respects; and he failed with the jury as to each of them. Then it was sought to make out a case of ability to have avoided injuring the man, notwithstanding his negligence, and failure to do so; but in that respect I quite agree with the trial Judge that there was no reasonable evidence to support a finding for the plaintiff upon it, if it can be said that there really is any such finding. The jury found that the defendants were guilty of negligence, causing or helping to cause the collision, in this, that "the car should have been stopped in a shorter distance;" and they also found that, notwithstanding the plaintiff's negligence, the defendants could, by the exercise of reasonable care, have prevented the collision; that the driver should have seen the man sooner and sounded his gong continuously.

Some confusion has arisen from the way in which the plaintiff stated his case in the pleadings, the form in which the questions were asked, and the answers of the jury; it was necessary to frame the questions in some such manner as they were put, owing to the issues as to sounding the gong and excessive speed; but, these issues having been found against the plaintiff, but for the additional question raised at the trial as to the driver's failure to see the plaintiff sooner, the verdict should have been in the defendants' favour on the question of primary negligence; and the decks would have been cleared for the single question, whether, notwithstanding the plaintiff's negligence, the defendants could, by the exercise of ordinary care, have avoided injuring him, there being obviously negligence on his part causing the injury; so that the answers would have been, no negligence on the part of the defendants causing the injury, negligence on the part of the plaintiff causing it, but, if the evidence warranted such a finding, that, notwithstanding such negligence, of the plaintiff, the defendants, by the exercise of ordinary care, might have avoided the injury. The question, raised at the trial, of negligence in failing to see the man and so

running him down, however, prevented that mode of dealing with the case; and the finding that there was such negligence was a finding of primary negligence of the same character as not sounding the gong and running at excessive speed; if the findings had been that, after seeing the man and his danger, there had been neglect to sound the gong, an entirely different case would have been presented, one of ultimate negligence; knowledge of imminent, but avoidable, danger gives rise to a new duty, a duty to even a trespasser, and failure to take reasonable care to avert the danger gives rise to a new cause of action, if not averted; but it was not found, or alleged, that such was the case; and so the sixth answer is met by the finding of contributory negligence; and there is no evidence whatever that, after the driver saw the man and the peril he was in, he could, by the exercise of ordinary care, have avoided the injury: the whole evidence points to his having then done all that reasonably could be expected, or done, to prevent it.

And in cases where there is some such evidence, Judges and juries ought to take care not to deal with it in a one-sided manner; to remember that it would be absurd for a driver to stop his car for every one who may be crossing the street, or otherwise approaching the track; if there is nothing to indicate the contrary, it may be taken for granted that the law of self-preservation will prevent them putting themselves in collision with a running car, that they will stop or turn aside in time, as, generally speaking, is always done; whilst, if there is anything to indicate, from blindness, deafness, absent-mindedness, or any other cause, obliviousness to the danger, prompt and energetic steps must be taken to avert it. In this case, there was no evidence of such obliviousness, on the plaintiff's part, until he was quite near to the track; and then everything seems to have been done that could have been done to save him from injury, and there is no evidence to the contrary; but his failure to look and his inability to hear prevented it. So, too, it must be borne in mind that the plaintiff was not the only object requiring the driver's attention; he had many things to do, and to look out for, besides.

There is no evidence that, after the plaintiff's danger became apparent to the driver, he could have stopped the car in a shorter

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distance than that in which it was stopped, or short of striking the man, or that he failed to do anything that could have been done to stop it as quickly as possible.

MOSS, C.J.O., MACLAREN and MAGEE, JJ.A., concurred.

*Appeal allowed.*

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[DIVISIONAL COURT.]

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RE BURNS AND HALL.

*Mines and Minerals—Mining Act of Ontario, 1908, sec. 78—Time for Performance of Work on Mining Claim—Commencement and Expiry of Periods—"The Three Months Immediately Following the Recording"—Restaking—Adoption of Staking of Former Holder of Claim—Failure to Shew Abandonment.*

"The three months immediately following the recording," during which the recorded holder of a mining claim is to perform thirty days' work thereon, according to sec. 78 of the Mining Act of Ontario, 8 Edw. VII. ch. 21, begins to run, not on the day of the recording, but on the next day thereafter.

The disputant, who staked and recorded mining claims on the 7th September, 1909, and did the thirty days' work within the three months, but did not do the sixty days' work required by the statute to be done within the year following the expiration of the three months, restaked on the 7th December, 1910, deeming that the year had expired and that the land was open. The respondents staked the same claims on the 8th December:—

*Held*, that both the restaking by the disputant and the staking by the respondents were properly disallowed by the Mining Commissioner—the former on the construction of the statute; and the latter because the claims were not abandoned, and the respondents had no right to appropriate the stakes planted by the disputant and to adopt as their work the blazing of the lines by him.

AN appeal by George Burns, the disputant, and a cross-appeal by Joseph Hall and others, the respondents, from a decision of the Mining Commissioner of the 3rd July, 1911.

George Burns, the disputant, staked and recorded five mining claims, 1931-P, 1932-P, 1933-P, 1934-P, and 1935-P, in the Porcupine Mining Division, on the 7th September 1909, and did the thirty days' assessment work required by the statute (the Mining Act of Ontario, 8 Edw. VII. ch. 21, sec. 78(1) (a)) to be performed within the three months immediately after the staking. He began to do the sixty days' work re-

quired by the statute (sec. 78(1) (b)) to be performed within the year following the expiration of the three months immediately following the staking; but, owing to the large number of miners and prospectors in Porcupine doing assessment work as well as prospecting, the dealers, who were accustomed to supply provisions to the miners and prospectors, were unable to supply the demand for provisions, with the result that Burns was unable to perform the sixty days' work required by the statute.

The respondents, believing that Burns would be unable to complete the assessment work, pitched a tent and camped therein on the side of the trail leading to the claims—along which Burns, going to and coming from the nearest post-office, must pass. They engaged Burns in conversation, and ascertained the difficulties that he was encountering in procuring provisions to supply the men whom he proposed to employ to do the assessment work.

Burns, realising his inability to perform the assessment work within the time limited, started out on the 7th December, 1910, and restaked the claims. Four of the respondents started out on the night of the 7th, reaching the claims at midnight, and proceeded to stake on the morning of the 8th in the most hurried manner, following the snow-shoe trails of Burns where he had staked on the 7th, leaving two of their number asleep in the tent. It was one minute past twelve o'clock, midnight, when they staked one claim, and five minutes past, when they staked the adjoining claim, the original discoveries being very close to the line dividing the two claims.

Burns disputed the staking of the respondents, and the respondents disputed the restaking of Burns, before the Mining Recorder; and the disputes were, by consent, transferred to the Mining Commissioner, who heard the parties on the 16th May, 1911, and delivered his judgment on the 3rd July, 1911, allowing the disputes of the disputant involving the cancellation of the respondents' claims, and allowing the disputes of the respondents to the application of the disputant to have his own stakings recorded. The Commissioner found the claims recorded in the names of the respondents invalid, and directed them to be

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cancelled. He found the stakings made by the disputant upon the same lands and the applications on file in the recording office also invalid, and directed them to be cancelled. From this decision the disputant appealed, and the respondents cross-appealed.

November 29. The appeal and cross-appeal were heard by a Divisional Court composed of BOYD, C., LATCHFORD and MIDDLETON, JJ.

*M. K. Cowan*, K.C., for the disputant. The lands in question became open on the 7th December; and, therefore, the disputant's stakings were valid, and so took precedence over and shut out the stakings of the respondents. The day of the recording of the claims should be included in the time allowed for the performance of the work under sec. 78 of the Mining Act of Ontario, ch. 21 of 8 Edw. VII., which provides that thirty days' work must be done "during the three months immediately following the recording." Section 84 reopens the lands automatically to restaking as soon as default occurs in the performance of the work. The words "immediately following" refer to the creation of a term, not the limiting of a time: *Lester v. Garland* (1808), 15 Ves. 248; *In re North*, [1895] 2 Q.B. 264. The recording was a judicial act; and, therefore, the time commenced to run *instanter*: *Re Sinclair* (1908), 12 O.W.R. 138.

*J. J. Gray*, for the respondents. The lands were not open until the 8th December, and so the disputant's stakings and his claims founded upon them are invalid. The time begins to run only on the day next after the recording. The words "immediately following" refer to a period of time and not to the creation of a term: *In re North*, [1895] 2 Q.B. 264. The recording is not a judicial act, but merely a ministerial one: *Munro v. Smith* (1906), 8 O.W.R. 452, 542, and (1907), 10 O.W.R. 97.

*Cowan*, in reply.

*J. J. Gray*, for the respondents on their cross-appeal. The staking by the respondents was sufficient to comply with secs. 54 to 58 of the Act: *St. Laurent v. Mercier* (1903), 33 S.C.R.

314; *Wheelden v. Cranston* (1905), 12 B.C.R. 489; *Crossley v. Scanlan* (1910), 15 B.C.R. 223; *Miller v. Taylor* (1881), 6 Col. 41; *Gelinas v. Clark* (1901), 8 B.C.R. 42.

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At the close of the respondents' argument upon the cross-appeal, the judgment of the Court thereon was delivered by BOYD, C.:—On the cross-appeal, there is no ground shewn for disturbing the decision of the Mining Commissioner, who is familiar with all this mining law. There are two lines of cases: one dealing with the situation where the claimant on restaking adopts his own old posts; the other, where he finds on the ground posts used in staking an abandoned claim. But the Commission thought this case different from either of these, because here the claims were not abandoned, and the respondents had no right to appropriate the stakes planted by the disputant, and to adopt as their work the blazing of the lines by him. On the question of the construction of the Act, we shall have to reserve judgment.

December 2. The judgment of the Court was delivered by BOYD, C.:—We reserved the question as to the meaning of the words used in the Mining Act, 1908, ch. 21, sec. 78, which provides that "the recorded holder of a mining claim shall perform thereon work . . . during the three months immediately following the recording, to the extent of thirty days," etc. What is meant by "the three months immediately following the recording?" That is, does the time begin to run on the day of the recording or from the next day thereafter?

I think the words "immediately following" are synonymous with "next after," referring (in the words of the Act later used) to "a period of time" and not to the creation of a term. In other words, the Act does not provide for an extension of time within which the work may be done, but for the limitation of a period for the doing of the required work. This falls within what is said to be the well-established rule, that, when a particular time is given from a certain date within which an act is to be done, the day of the date is to be excluded: *Mathew, L.J., in Goldsmiths' Co. v. West Metropolitan R.W. Co.*, [1904] 1 K.B. 1, at p. 5.

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Here the particular time is "three months," and the particular date for the computation is the three months next after the day of recording. Considering that the failure so to do the work involves forfeiture, the usual method of construction is to exclude the day from which the period is to run, so as to give as long a time as possible: *In re North*, [1895] 2 Q.B. 264, at p. 270.

The matter appears to be admirably put in language which I adopt from an Irish case in point, *Miller v. Wheatley* (1891), 28 L.R. Ir. 144, 154. The "three months" is "a collective or aggregate space," and the "space is reckoned, not from a point of time, but from an act."

The wording in the Irish case was, "next after," which is, I think, the exact equivalent of "immediately following." Indeed "following," *per se*, would probably mean, in statutory usage, "next after" (see 19 Cyc. p. 1083, *sub voce* "follow.") Here that is emphasised by the word "immediately."

I think, for these reasons, that the Commissioner was right, and this appeal should be dismissed.

As we have dismissed the cross-appeal, it will be well to let each party bear his own costs.

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PARSONS V. CITY OF LONDON.

Dec. 4.

*Municipal Corporation—Sale of Municipal Lands—City Hall Property—Market Place—Change of Site—Powers of Municipality—Authority to Sell—1 Geo. V. ch. 95, sec. 10(O.)—Interpretation—Evidence—Draft Bill and Notices—Position of Council in Making Sale—Trustees—Precautions—Bona Fides—Reasonable Grounds.*

Land purchased by the Corporation of the Town of London in 1852, for the purpose of enlarging the market place, was conveyed to the corporation in fee, no trust or purpose being indicated in the conveyances. In 1853, the town council changed their plan, and erected upon the front part of the land so purchased a town hall, at the same time using other land—purchased for a town hall site as well as to enlarge the market place—for market purposes only:—

*Semble*, that the change was within the municipal powers.

*Kennedy v. City of Toronto* (1886), 12 O.R. 211, specially referred to.

In January, 1911, a bank made an offer of \$100,000 for "the city hall property, having a frontage of 110 feet on Richmond street by a depth of 110 feet to the market square." This description included land to the rear of the city hall, which was in fact part of the market square, but had come to be regarded as city hall property:—



*Held*, that the corporation were authorised by 1 Geo. V. ch. 95, sec. 10 (O.), to sell this land.

*Held*, also, that the draft of the bill upon which this Act was founded and the notices published were not admissible in evidence to aid in the interpretation of the Act.

The corporation contracted to sell the land to the bank at the price named; and in this action the sale was attacked as having been made by the city council, who were said to occupy a fiduciary position, without the observance of the precautions that ought to be taken by trustees:—

*Held*, that all the rules of equity with reference to the conduct of trustees cannot be applied to a municipal council in the exercise of its statutory powers; and there is no warrant in law or in equity for the contention of the plaintiff, that, when the Legislature has said that these lands may be sold by the city corporation "at such price and upon such terms as the Council of the Corporation may deem expedient," the Court can add to this, "provided such sale is by public auction or by tender after due advertisement, and not in a private way, but only after adequate steps have been taken to ensure competition."

*Phillips v. City of Belleville* (1905), 9 O.L.R. 732, and *Bowes v. City of Toronto* (1858), 11 Moo. P.C. 463, discussed.

And *held*, upon the evidence, that the sale was made in good faith, and the council not only had reasons which they might reasonably consider good and sufficient to justify their action, but acted with prudence, propriety, and wisdom; and, therefore, the sale should be upheld.

*Phillips v. City of Belleville* (1906), 11 O.L.R. 256, 259, followed.

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ACTION by John M. Parsons, on behalf of himself and all other ratepayers of the City of London, for a declaration that the defendants the Corporation of the City of London were not entitled to sell, convey, or in any way alienate a portion of the market square and arcade which they had contracted to sell to the defendants the Royal Bank of Canada.

November 20. The action was tried before MIDDLETON, J., without a jury, at London.

Sir George C. Gibbons, K.C., and C. G. Jarvis, for the plaintiff.

T. G. Meredith, K.C., for the defendants the Corporation of the City of London.

J. B. McKillop, for the defendants the Royal Bank of Canada.

December 4. MIDDLETON, J.:—The block bounded by Dundas, Richmond, King, and Talbot streets contained ten lots, Nos. 11-15 on the south side of Dundas street, and lots 11-15 on the north side of King street.

In 1846, the owners of lots 12-14 on each street conveyed the rear 55 ft. of each of these six lots to "The President and Board

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of Police of London and their successors in office," in trust for the purpose of a public market and such other public purposes connected therewith as such Board may deem meet."

These conveyances appear to have been a gift, as the memorial registered states a nominal consideration of five shillings in each conveyance.

The plot so conveyed would be a land-locked parcel in the centre of the block. Access to this parcel was provided by the conveyance of two narrow strips, 7 ft. and 13 ft. wide, adjoining the boundary of lots 11 and 12, from the north-east angle to the south side of Dundas street.

These conveyances contained a provision that, "if at any time thereafter a lane or street shall be opened from the market square through lot number 11 on the north side of King street to Richmond street," the land should revert to the grantor.

This 20-foot lane, though affording access to the market square as it then existed, was manifestly quite inadequate, particularly when it is realised that only 7 feet of the south end abutted the market square—the remaining 13 feet faced the lands to the rear of the city hall, to which the city had then no title. The provision in the conveyance just quoted indicates that from the first it was regarded as a temporary arrangement only.

In 1852, the municipal council took up the market question. On the 20th July, a resolution was passed calling upon a committee theretofore appointed to report on certain improvements to the market place, "to further report on the feasibility of enlarging the said market place by extending the same to Richmond street." On the 26th July, the committee reported that the market site was "quite inadequate for a market place, from the great increase of business transacted thereon," and recommended the purchase of certain lands, not specifically described, but, no doubt, being the parcel between the eastern end of the market square and Richmond street, at £17.10 per foot. This report was adopted, and on the same day a resolution authorising the purchase of this parcel was carried.

On the 9th August, 1852, this parcel was conveyed to the city in fee, no trust or purpose being indicated in the convey-

ances. The parcel so acquired was 110' x 110', title being made by a number of conveyances, as the parcel had been much subdivided. It consisted of the rear 55 feet of lot 11 south of Dundas street and the rear 55 feet of lot 11 north of King street. The total cost would, at the price given, be £1,925.

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On the 25th September, a by-law to raise the sum of £2,000 for the enlargement of Covent Garden Market was read and directed to be published. No doubt, this is the by-law finally passed in January, 1853, as No. 29. This is a debenture by-law, authorising the raising of £2,000 by way of loan "for the enlargement of Covent Garden Market."

On the 8th November, 1852, a by-law, No. 26, was passed, authorising the purchase of the lands in question. This by-law was passed to give effect to the resolution of the 26th July, and defines the purpose of the purchase as "for the enlargement of Covent Garden Market for the use of the inhabitants of the Town of London as a corporation."

This by-law further provides that "any of the aforesaid lands, when no longer required for the purposes aforesaid, shall be sold."

In December, 1853, the council surrendered the 20-foot right of way to Dundas street, pursuant to the terms of the conveyance under which it was held. This indicates that the lands in question were regarded as affording a way to Richmond street for use in connection with the market.

The market was afterwards enlarged by the purchase of lands lying between the original square and King and Talbot streets. These purchases were completed in 1853. I do not think the details are in any way material.

It was not until the purchase of these additional lands was contemplated that the question of a site for the town hall came up.

On the 3rd March, 1853, a notice of motion was given of a by-law "to borrow £20,000 to pay for the lands purchased for the enlargement of Covent Garden Market and for defraying the cost of erecting a town hall on the same." This must refer to the King street and Talbot street lands, as the Richmond street land had been purchased in 1852.

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This by-law was on the 21st March, 1853, directed to be advertised, and was, no doubt, carried. It has not been proved.

On the 16th May, 1853, a report was received from the committee upon improvements, recommending that the town hall front on Richmond street. This report is not produced, but the minutes shew that it was adopted.

On the 15th June, 1853, it was resolved "that the town hall be erected fronting on Richmond street, to cover the whole ground, with an arcade through the centre: the width of the town hall to be 60 ft. in the clear inside."

The by-law to raise the \$20,000 was read for the third time and passed on the 27th June, 1853.

This ends the record of the proceedings leading up to the erection of the city hall in 1854, so far as the evidence goes.

From this it is clear that the Richmond street land was purchased as an addition to the market place, and that a year afterwards, at the time of the purchase of the lands on King and Talbot streets for a further addition to the market and a site for the town hall, a change was determined upon, and the town hall was built upon the Richmond street lot.

The town hall was erected upon the front portion of this lot, leaving the rear portion, some 30 x 110, open; and this has always been, and still is, used as part of the market.

The conveyances of the Richmond street lands were not upon condition. The municipality acquired the fee. The circumstances shew the purpose for which these lands were purchased. In the opinion I have formed, it is not necessary to determine the question whether the readjustment of the municipal plans made in 1853—by using this land, purchased to enlarge the market, as a town hall site, and at the same time using the King and Talbot street lands, purchased to afford a site as well as to enlarge the market, for market purposes only—is open to criticism. At present, I think this change was well within the municipal powers. See *Kennedy v. City of Toronto* (1886), 12 O.R. 211.

The market by-law (757) recognises this space to the rear of the city hall as forming part of the market square. Other municipal action accords with this.

I am quite satisfied that there never was any intention to divert from its original use any part of these Richmond street lands until the sale in question was contemplated; and, if this were sufficient to determine the case, the matter would be easy.

In the offices of the assessment department this whole lot, 110 x 110, came to be regarded as the city hall property. This is in itself a matter of no moment, but serves to explain much that took place afterwards.

On the 30th January, 1911, the Royal Bank made an offer of \$100,000 for "the city hall property, having a frontage of 110 feet on Richmond street by a depth of 110 feet to the market square." This offer was accepted, and there is no doubt that it was the intention of both parties to deal with the whole parcel. The fact that this parcel was called "the city hall property" does not make any difference in the construction of the agreement. The subject-matter of the agreement undoubtedly was this parcel.

I am, however, satisfied, upon the evidence, that the city council and the bank both thought that this was "city hall property." The council did not intend to deal with the site, or any part of it, as market property. They did not realise that they were selling any part of the market site; and, if it is in any way material, there was never any determination that this land or any part of it was no longer required for municipal purposes or no longer required for the purposes of the market.

The land to the rear of the city hall is not, perhaps, a very important part of the market site, but it is in fact a part of the site, and serves useful purposes in connection with the market; and, if the authority to sell rested upon the general provisions of the Municipal Act permitting a sale of land no longer required, the sale could not stand, because it has not been made to appear by any municipal action, or by evidence apart from municipal action—if, indeed, that is permissible—that this land is no longer required.

The right to dispose of this land is mainly rested upon the Act of 1911, 1 Geo. V. ch. 95, sec. 10. That section provides: "The Corporation of the City of London may sell at such price and on such terms as the Council of the Corporation may deem

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expedient, the city hall and the police station in the said City of London, or either of them, and the lands upon which the same are situate, the lands upon which the city hall is situate being the southerly fifty-five feet of lot number eleven (11) on the south side of Dundas street and the northerly fifty-five feet of lot number eleven (11) on the north side of King street in the said city, and may convey the same to the purchaser or purchasers thereof at such time within five years from the passing of this Act, as the said Council may see fit." Then follows a provision protecting the rights (if any) of the adjoining property owners.

This statute seems to me to be plain and free from all ambiguity. Power to sell this precise parcel is given. Had the statute simply given power to sell "the lands upon which the city hall is situate," the case would have been difficult: the definition which follows cannot be ignored, and removes all difficulty.

Counsel tendered, and, subject to objection, I allowed to be received, a draft of the bill and the notices published. These, I rule, are not admissible. I must interpret the statute by what appears upon its face, and any redress that the parties may think themselves entitled to, if the Act as passed is wider than the notice published warranted, must be sought from the Legislature, and not from the Courts.

This particular sale is attacked as having been made by the council, who are said to occupy a fiduciary position, without the observance of the precautions that ought to be taken by trustees.

*Phillips v. City of Belleville* (1905), 9 O.L.R. 732, is relied upon as authority for the proposition that "a municipal corporation occupies, as regards corporate property, the position of a trustee, and is amenable to the like jurisdiction of the Courts as is exercised over trustees generally." This statement, taken from the head-note, is well warranted by the decision of the majority of the Court, and I propose to accept it as an accurate statement of the law. At the same time, I think it proper to say that, if the question had been open, I should have great difficulty in assenting to it. No doubt, the councillors occupy

a fiduciary position towards the ratepayers, which will render them liable to account for any secret profit they may make out of municipal business—it was so held in *Bowes v. City of Toronto* (1858), 11 Moo. P.C. 463; but, with deference, it seems to me that this falls far short of determining that all the rules of equity with reference to the conduct of trustees can be applied to a municipal council in the exercise of its statutory powers.

In *Bowes v. City of Toronto* (at p. 524) it is said: “The Common Council of Toronto cannot in any proper sense of the term be deemed a legislative body; nor can it be so treated. The members are merely delegates in and of a provincial town for its local administration. For every purpose at present material, they must be held to be merely private persons having to perform duties, for the proper execution of which they are responsible to powers above them.”

This was said in 1858. Municipal councils are now recognised as occupying a far more important position. They now have important legislative as well as administrative functions, and the trend of decision is to recognise the supremacy of the council, both in the legislative and administrative field, so long as the act done is within the ambit of its jurisdiction, and not *ultra vires*. If the “powers above,” to which the municipal council is to answer, are the civil Courts, then the Courts have been steadily abdicating their jurisdiction and declining to sit as an upper chamber of the municipal council, and to interfere with the action of the people through their elective representatives, unless fraud is shewn. If the council seeks to go beyond the limited authority given by the supreme Legislature of the Province, it is then the duty of the Courts to confine its action to the limits of the delegated authority; but I can find no warrant in law or in principle for that which is here contended by the plaintiff, that, when the Legislature has said that these lands may be sold by the city “at such price and upon such terms as the Council of the Corporation may deem expedient,” the Court can add to this, “provided such sale is by public auction or by tender after due advertisement, and not in a private way, but only after adequate steps have been taken to ensure competition.”

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When scrutinised, *Phillips v. City of Belleville* does not really go as far as this. The little fire which there caused so great a smoke was the sale of a lot, bought in at a tax sale, to one to whom the majority of the council thought they were in honour bound for \$265, in preference over another who at the last moment made an offer of \$326.50. After laying down the principles relied upon, the Court conclude (9 O.L.R. at p. 747): "If, however, the corporation desires to prove good reasons which induced a preference for . . . Caldwell there may be a further trial." This trial was had and a further appeal taken ((1905-6), 6 O.W.R. 1 and 11 O.L.R. 256), and the Court on this second appeal said (11 O.L.R. at p. 259) that it was "sufficient for the decision of the question if we find, first, that the council acted in perfect good faith, and, second, that they had reasons before them which they may reasonably have considered good and sufficient to justify their action."

In the case before me, without any hesitation I find perfect good faith, and not only that the council had reasons which they might reasonably consider good and sufficient to justify their action, but I find that, in what they did, they acted with prudence and propriety, and, if I may say so, with wisdom. They received from the bank an offer for this property at a price, \$100,000, which, upon the evidence, I find to be not only a good price, but a price equalling or exceeding what would reasonably be expected to be realised. This offer was made upon the express terms that it should be either accepted or rejected, and that it should not be made the basis of competition. The bank were ready to give this sum if at once accepted, or to take their chance in public competition. The highest offer received for this property, known for some years to be on the market, was \$85,000. This was an advance of \$15,000. This was, after consideration, accepted. There was some evidence that the Merchants Bank, after their rival had secured this site, would give the same price for the building and the 75 feet in depth on which it stands, but this was only put forward after the council was bound in honour, and probably in law, to the defendant bank. And no binding offer was made. Some experts, no doubt the most opti-



mistic the plaintiff could find, give an opinion that public competition might bring \$110,000; but this is opinion only, as against actual money.

On all grounds, the action fails and must be dismissed with costs.

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[IN CHAMBERS.]

RE KEELING AND TOWNSHIP OF BRANT.

1911

Dec. 6.

*Municipal Corporations—Local Option By-law—Petition for Submission—Right of Petitioners to Withdraw Names—Liquor License Act, sec. 141, and Amendments—Mandamus.*

Where a petition in writing signed by twenty-five per cent. of the total number of persons appearing by the last revised voters' list of the municipality to be qualified to vote at municipal elections, is filed with the clerk of the municipality, on or before the 1st November, praying for the submission of a local option by-law (Liquor License Act, R.S.O. 1897, ch. 245, sec. 141, amended by 6 Edw. VII. ch. 47, sec. 24, and 7 Edw. VII. ch. 46, sec. 11), it is not open to any of the petitioners, after the 1st November, even before action by the municipal council, to withdraw their names.

*Halladay v. City of Ottawa* (1907), 14 O.L.R. 458, distinguished.  
Mandamus to a township council to submit a by-law.

MOTION for a mandamus to the Corporation of the Township of Brant to submit a local option by-law to a vote of the municipal electors of the township.

December 1. The motion was heard by SUTHERLAND, J., in Chambers.

*T. H. Peine*, for the applicant.

*R. C. H. Cassels*, for the Corporation of the Township of Brant.

*J. Haverson*, K.C., for opponents of the by-law.

December 6. SUTHERLAND, J.:—The application is by one Keeling, a ratepayer and an elector of the township of Brant, in the county of Bruce, for "an order of mandamus requiring the respondents, the corporation of the said township, to submit to a vote of the municipal electors of the township, at the next municipal elections, a by-law for prohibiting the sale by retail of spirituous, fermented, or other manufactured liquors, in any

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inn or other house or place of public entertainment, and for prohibiting the sale thereof except by wholesale in shops and places other than houses of public entertainment, in accordance with the prayer of the petition of John Bell, C. W. Keeling, and others, filed with the clerk of the said municipality on or before the 1st day of November, 1911."

A statement of facts admitted was put in, signed by the solicitors for the applicant and respondents respectively, as follows:—

"1. That a petition in writing; purporting to be signed by 25 per cent. of the total number of persons appearing by the last revised voters' list of the township of Brant to be qualified to vote at municipal elections, and praying for the submission of a local option by-law, under sec. 141 of the Liquor License Act, by the respondents' council, for the approval of the electors of the municipality, in the manner provided by sections in that behalf of the Municipal Act, was filed with the clerk of the said municipality on or before the 1st day of November instant.

"2. That the total number of persons appearing by the last revised voters' list of the township of Brant to be qualified to vote at municipal elections is 1,104.

"3. That the petition filed was signed by 303 persons.

"4. That the municipal council of the township of Brant met at Dunkeld, in the said township, on Friday the 10th day of November, 1911, and duly considered the said petition, together with a second petition hereinafter mentioned.

"5. That eleven names of persons not qualified to vote at municipal elections were struck off the said petition.

"6. That the number of persons appearing to be qualified to vote at municipal elections in the township of Brant, as reported to the council, and then remaining on the said petition, after the said eleven names were struck off, was 292.

"7. That a petition was produced by those interested in opposing the submission of the said by-law, containing the signatures (verified by the witnesses thereto) of 16 persons who had signed the original petition, requesting that their names should be withdrawn from the said original petition.

"8. That such second petition, containing the said 16 names, was presented to and placed in the possession of the said council on the said 10th day of November, before any action was taken or any conclusion arrived at upon the subject-matter of either petition, as hereinafter stated.

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"9. That, at the said council meeting, one Joseph Reinhardt, a duly qualified voter, who had signed the said original petition, added his name to the petition requesting the withdrawal of names from the original petition, which additional name made a total of 17 signatures of persons who desired to withdraw from the original petition.

"10. That the subtraction of the said 17 subscribers by the council from the 292 names remaining on the original petition left the net number of petitioners as 275, which was one less than the 25 per cent. required by the said Act.

"11. That the respondents' council refused to submit the by-law as prayed for by the said original petition, upon the ground that the 17 petitioners signing the counter-petition, requesting that their names be withdrawn from the original petition, had a right to do so, and that, therefore, the said original petition was not sufficiently signed, within the meaning of sec. 141, sub-sec. 3, of the Liquor License Act."

Sub-section 2 of sec. 141 of the Liquor License Act was, by (1906) 6 Edw. VII. ch. 47, sec. 24, repealed and the following, among other, sub-sections were substituted therefor:—

"(2) The day fixed by the by-law for taking the votes of the electors thereon shall be the day upon which, under the Consolidated Municipal Act, 1903, or any by-law passed under the said Act, a poll would be held at the annual election of members of the council of the municipality.

"(3) In case a petition in writing signed by at least twenty-five per cent. of the total number of persons appearing by the last revised voters' list of the municipality to be qualified to vote at municipal elections, is presented to the council on or before the 1st day of November next preceding the day upon which such poll would be held, praying for the submission of such by-law, it shall be the duty of the council to submit the same to a vote of the municipal electors as aforesaid."

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And sub-sec. 3 of sec. 141 was amended by (1907) 7 Edw. VII. ch. 46, sec. 11, as follows: "11. Sub-section 3 of section 141 of the Liquor License Act enacted by section 24 of the Act passed in the sixth year of His Majesty's reign, chaptered 47, is amended by striking out the words 'is presented to the council' in the 4th and 5th lines of the said sub-section and inserting in lieu thereof the words 'is filed with the clerk of the municipality.' "

The main contention on behalf of those opposing the motion is, that the petitioners who signed the second petition had a right to withdraw their names from the first petition before action taken by the corporation. *Halladay v. City of Ottawa* (1907), 14 O.L.R. 458, is cited in support of this view. In that case there was a motion to quash a by-law passed by the Council of the City of Ottawa, under and by virtue of the Ontario Shops Regulations Act, R.S.O. 1897, ch. 257, providing for the early closing by grocers of their shops in the city.

R.S.O. 1897, ch. 257, sec. 44, sub-sec. 3, is as follows: "3. If any application is received by or presented to a local council, praying for the passing of a by-law requiring the closing of any class or classes of shops situate within the municipality, and the council is satisfied that such application is signed by not less than three-fourths in number of the occupiers of shops within the municipality and belonging to the class or each of the classes to which such application relates, the council shall, within one month after the receipt or presentation of such application, pass a by-law giving effect to the said application and requiring all shops within the municipality, belonging to the class or classes specified in the application, to be closed during the period of the year, at the times and hours mentioned in that behalf in the application."

Sub-section 8 of sec. 44 reads as follows: "(8) If at any time it is made to appear to the satisfaction of a local council that more than one-third in number of the occupiers of shops to which any by-law passed by the council under the authority of sub-section 3 of this section relates, or of any class of such shops, are opposed to the continuance of such by-law, the local council may repeal the said by-law, or may repeal the same in so

far as it affects such class of shops as aforesaid, but any such repeal shall not affect the power of the council to thereafter pass another by-law under any of the provisions of this section."

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A by-law had been passed. The contention against it was that (p. 460) "before the passing of this by-law certain of the petitioners had withdrawn their names, so that at the time of its passing there were not three-fourths of the occupants doing business as grocers in Ottawa in favour of it." At p. 462, Britton, J., says: "It was argued that, upon a motion to quash, the work of the city clerk must be taken as final." (The clerk had examined and certified to the council the regularity of the petition). "I do not agree with this. The council must be satisfied that such application is signed by not less than three-fourths in number of the occupiers, etc. The application must in fact be so signed." And at p. 461: "I am of opinion that those seeking to withdraw from the application before the by-law was read a first time had the right to do so, and, as their desire was then properly before the council, the by-law was in fact passed without the necessary sanction of the required majority, and so is bad and should be quashed."\*

Other cases which may be referred to also are: *Re Misener v. Township of Wainfleet* (1882), 46 U.C.R. 457; *In re Robertson and Corporation of North Easthope* (1888), 15 O.R. 423, reversed in appeal (1889), 16 A.R. 214; *Gibson v. Township of North Easthope* (1894), 21 A.R. 504, affirmed (1895), 24 S.C.R. 707.

I was also referred to the following cases:—

*Williams v. Citizens* (1883), 40 Ark. 290, under a local option law known as "the three-mile law." At p. 293: "That provides for a petition by the adult inhabitants residing within three miles of any school house, church, etc., upon which the County Court, being satisfied that a majority of such inhabitants have signed such petition, shall make an order granting the prayer, that is, prohibiting the sale of liquors within that area." Page 294: "The petition is only the jurisdictional condition upon which the Court acts, when satisfied that it contains the

\*The judgment of Britton, J., was affirmed by a Divisional Court: *Re Halladay and City of Ottawa* (1907), 15 O.L.R. 65.

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names of a majority of the adult inhabitants." Page 295: "If the original signatures were obtained intelligently and without fraud, and have not been erased before presentation, or afterwards by leave of the Court, they fulfill the requirements of the statute, and confer jurisdiction." The head-note of the case, p. 290, is as follows: "The signatures are taken as *primâ facie* genuine or properly authorised, and unless the Court should, for good reason, permit them to be withdrawn, its only province is to determine from the best mode fairly practical, whether they constitute a majority of the adult inhabitants within the prescribed limits. A remonstrance or counter-petition is not provided for by the statute and is in no sense evidence, but may be admitted as apprising the Court that the petition does not contain a majority of the inhabitants; but, even if signed by the same parties as the original, need not prevail over it."

*State v. Gerhardt* (1896), 145 Ind. 439. The head-note is as follows: "Under sec. 9, Act of March 11, 1895, 'An Act to Better Regulate and Restrict the Sale of Intoxicating, Spirituous, Vinous, and Malt Liquors,' etc., providing that, if three days before the regular session of the board of county commissioners, a majority of the legal voters shall sign and file a remonstrance, the license shall not be granted, a withdrawal of one's name from a remonstrance cannot be made after the beginning of the third day before such meeting." Page 470: "By section nine, another condition, or restriction, is imposed upon the jurisdiction of the board relative to granting a license to retail liquors to any applicant, namely, the fact that a remonstrance against him, signed by a majority of the legal voters of the township or ward wherein he intends to engage in the sale of such liquors, has been filed with the auditor, three days before the beginning of the regular session of the board at which the application for the license is to be presented. In the event this fact is found to exist, the jurisdiction of the commissioners over the matter, by virtue of the law, is terminated, and it is made unlawful for them to grant the license to the applicant."

In the present case it is clear from the admitted facts that on or before the 1st November, 1911, a petition in writing, signed by at least 25 per cent. of the total of persons appearing by the

last revised voters' list of the municipality to be qualified to vote at municipal elections, had been "presented to the council" (7 Edw. VII. ch. 46, sec. 11), "filed with the clerk of the municipality," praying for the submission of such a by-law as is in question herein.

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This being so, sub-sec. 3 of sec. 24 provides that under such circumstances "it shall be the duty of the council to submit the same to a vote of the municipal electors." There is no provision for a counter-petition or withdrawal of signatures. No action of any kind with respect to said original petition was taken by the council on or after the 1st November, until their next regular meeting on the 10th November following. They then considered the petition, and scrutinised it, as they had a right to do, to see that the signatures were those of persons qualified to sign, and that they constituted the requisite 25 per cent. They rejected 11 names of persons not so qualified, as they were also entitled and bound to do. Upon the facts stated and admitted, they further considered the counter-petition of the 16 persons who thereby asked the council to allow them to withdraw their names from the original petition, and thereby also attempted to withdraw their names from the said petition and to cancel and declare void their execution thereof. Having considered the petition and counter-petition, including the addition to the latter of the name of Joseph Reinhardt, who withdrew or attempted to withdraw his name from the first petition at the said meeting of the council, they apparently came to the conclusion embodied in the following resolution adopted at the meeting: "That, in reference to the petition presented to the council asking for the submission of a local option by-law at the municipal election in January, in the opinion of this council the provisions of sub-sec. 3 of sec. 141 of the Liquor License Act have not been complied with, and we do not feel compelled to submit the same."

The resolution does not in express terms say that the council permitted the 17 signers of the original petition who attempted to withdraw to do so, nor was any resolution passed by the council to that effect. The statute in question has fixed a date, the 1st November, towards the close of the year, when a petition of the kind in question must, in order to be effective

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for the purpose intended, be filed with the clerk of the municipality, so as to render it obligatory upon the council to pass a by-law to be submitted to the electors. But, even after a proper petition has been filed before the 1st November and the by-law passed by the council, there are certain other formalities required to be observed before the vote can be taken at a definite time, also fixed by statute, viz., that fixed for the ensuing municipal elections.

By the Consolidated Municipal Act, 1903, sec. 338, subsec. 2, the by-law must, before the final passing thereof, be published within the municipality in some public newspaper for three successive weeks. The meeting of the council after the 1st November and the passing of the by-law and its publication consumes much of the time between that date and the date fixed for the election. Those in favour of having a by-law passed to be submitted to the people had undoubtedly, on the admitted facts, complied fully with the law at the date fixed by the statute, viz., the 1st November.

It is contended that persons who have seen fit to change their minds, for some reason not in evidence, before action taken by the council on the original, have a right to withdraw. I do not think it is open for them to do so under the statute in question. If they can, in what position does it place the matter? This is not a by-law that can be asked for and obtained within a month during any portion of the year, as was the case under consideration in *Halladay v. City of Ottawa*. Here, those desiring the by-law to be passed had secured more than the necessary number of qualified electors before the fixed date in the year mentioned in the statute. Possibly they could have obtained more signatures to it, if they had thought there was any danger of such a thing occurring as has occurred. They cannot now, after the date so fixed by statute for filing it with the clerk, obtain further signatures to the petition sufficient in number to legalise it. They would, therefore, be compelled to wait another year before having the matter dealt with. I cannot think it was so intended. I cannot think that the section as framed contemplated or permits of such a result. I think it was the duty of the council, when they ascertained that at the 1st November



a petition had been filed with the clerk, which then contained the necessary 25 per cent. of qualified names, to treat the matter, so far as the petition was concerned, as ended, and feel under obligation, as I think they were, to pass a by-law.

The case of *Bannerman v. Lawyer* (1900), 45 C.L.J. 484, is somewhat in point. That was a case in connection with a certificate required to be signed in a particular way under R.S.O. 1897, ch. 245, sec. 11, sub-sec. 14. Meredith, C.J.C.P., said as follows: "The first objection . . . depends upon the proposition that the persons who signed the certificate mentioned in sub-sec. 14 of sec. 11 are entitled before the license commissioners have acted upon that certificate to withdraw their names and having withdrawn that the certificate is to be treated as if it never had had their signatures. I think that is not the correct view. I am unable to distinguish the *Kent* case, under the Canada Temperance Act, which has been referred to. It seems to me that if that decision was a proper one under that Act, it is an *â fortiori* case that there is no right on the part of a person who signs such a certificate as that in question here to withdraw."

The motion is allowed, and a mandatory order requiring the corporation to submit a by-law as asked, is granted, with costs.

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RE STURMER AND TOWN OF BEAVERTON.

April 11

Dec. 7

*Costs—Inherent Jurisdiction of Court—Motion to Quash Municipal By-law—Nominal Applicant Put Forward by Real Litigants—Additional Security for Costs—Insufficiency of Amount Required—Real Litigants Ordered to Pay Deficiency—Judicature Act, sec. 119.*

As part of its inherent jurisdiction to prevent abuse of its process, the Court will stay proceedings, as being taken against good faith, when a man of straw is put forward by those really litigating, until they either give adequate security for costs or consent to be added as parties; this jurisdiction may be exercised as well in the case of a summary application to the Court as in an action; and the statutory requirement of security in a certain sum, upon a motion to quash a by-law, does not take away the right of the Court to require those invoking its aid to come before it and assume full responsibility for their actions or to supply such security as will be adequate to meet the costs of the opposite party.

Where a summary application to quash a local option by-law was made in the name of a man of straw, who was put forward by the real actors, two hotel-keepers, proceedings were stayed until they should give security for costs, in addition to the security required by the Municipal Act, 1903, sec. 378, sub-secs. 4, 5, 6, or consent to be added as applicants.

This order having been complied with by giving the additional security required, and the whole security having been found inadequate to satisfy the taxed costs of the respondents (the motion and also an appeal having been dismissed), an order was made requiring one of the aforesaid hotel-keepers to pay the balance of the respondents' costs.

The Court, under sec. 119 of the Judicature Act, has full power to determine by whom and to what extent costs are to be paid; and, in the exercise of its inherent power and equitable jurisdiction, will make a person who has set the Court in motion pay the costs of his unsuccessful application, though he be not formally a party.

MOTION by the Corporation of the Town of Beaverton for an order requiring Henry Sturmer to give additional security for the costs of his application to quash a local option by-law.

April 10. The motion was heard by MIDDLETON, J., in the Weekly Court at Toronto.

*W. E. Raney, K.C., for the corporation.*

*J. B. Mackenzie, for Sturmer.*

April 11. MIDDLETON, J.:—It is here shewn that this proceeding is not in truth taken by the applicant, but he is put forward by Overend and Hamilton, who are the real actors.

The Court has inherent jurisdiction to prevent abuse of its process, and, as part of this jurisdiction, will stay proceedings, as being taken against good faith, when a man of straw is put forward by those really litigating, until they either give adequate security or consent to be added as parties, so that an order for costs may be made against them in the event of failure. This jurisdiction may be exercised as well in the case of a summary application to the Court as in an action.

The statutory\* requirement of security to a certain sum in any case does not take away the right of the Court to require those invoking its aid to come personally before it and assume full responsibility for their actions or to supply such security as will be adequate to meet the respondents' costs.

If the real applicants consent to be added, no further order need be made—if they do not, they must give further security by paying \$200 further into Court, or by a bond in twice this amount. In the event of the applicants failing to give this security or to file a consent to be added, duly verified, in a month, the motion against the by-law should be dismissed with costs, and in the meantime the hearing of the motion must be stayed.

Costs of this motion will be to the respondents (the corporation) in any event of the main motion.

This motion might well have been made in Chambers, and the order should issue as a Chambers order.

In compliance with this order, an additional sum of \$200 was paid into Court as security for the costs of the corporation; and the motion to quash the by-law was heard and dismissed. An appeal to a Divisional Court was also dismissed. See 24 O.L.R. 65.

The taxed costs of the corporation exceeded the amounts paid into Court; and a motion was made by the corporation for an order requiring and directing Alexander Hamilton to pay the amount of the excess.

December 6. The motion was heard by Boyd, C., in the Weekly Court at Toronto.

\*Municipal Act, 1903, sec. 378, sub-secs. 4, 5, 6.

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*W. E. Raney*, for the Corporation of the Town of Beaverton,  
 the applicants.

*G. Lynch-Staunton*, K.C., for Hamilton, the respondent.

December 7. BOYD, C.:—My brother Middleton has already found, on the examination which is in evidence, that the petition in the name of Sturmer was a matter for which Hamilton and Overend were responsible (with which I agree). Sturmer is a man of straw; and they feared to appear lest they might be liable for costs: they became responsible to the solicitor who acted for Sturmer for costs; and the proceeding was really an abuse of the process of the Court. The real litigants are these two hotel-keepers; and this application is against one only, to make him pay the balance of costs, \$384, payable by Sturmer to the corporation, on the dismissal of the application to quash. There is inherent power in the Court to make a person who has set the Court in motion pay the costs of his unsuccessful application, and this though the person be not formally a party, but one who is the instigator and supporter of the movement: *In re Bombay Civil Fund Act* (1888), 33 Sol. J. 107, 40 Ch. D. 288; *Attorney-General v. Skinners Co.* (1837), C.P. Coop. (Prac.) 1, 7. Under the Judicature Act, there is now ample jurisdiction to deal with costs: full power is given to determine by whom and to what extent costs are to be paid: sec. 119; *In re Appleton French and Scrafton Limited*, [1905] 1 Ch. 749; *Corporation of Burford v. Lenthall* (1743), 2 Atk. 551, 553.

As to inherent jurisdiction to give costs apart from any statutory enactment, it is said in the *Encyclopædia of the Laws of England*, 2nd ed., vol. 4, p. 43, tit. "Costs": "The Court of Chancery assumed from its commencement the power to deal with all questions of costs, without the aid of the legislature." The subject is discussed by Fry, L.J., in *Andrews v. Barnes* (1888), 39 Ch. D. 133, 138, 139, and adverted to by Lord Herschell in *Guardians of West Ham Union v. Churchwardens, etc., of St. Matthew, Bethnal Green*, [1896] A.C. 477, at p. 483. See also Merrifield on Attorneys and Costs, p. 613. Again, every Court has inherent jurisdiction, independently of any statute, to order costs to be paid by any one who puts it in motion wrongly in

a fruitless and unjustifiable application: *In re Bombay Civil Fund Act*, 40 Ch. D. 288. Like power as to costs is now given by the Judicature Act; and it is not necessary to invoke the direction that the rules of common law as to costs must give way to those of equity: sec 58 (13).

The practice has long prevailed in ejectment that, wherever the Court finds that there is a real plaintiff or defendant behind the nominal plaintiff or defendant, the Court will compel him to pay the costs in a summary way. This rule is based on equitable principles and in the exercise of equitable jurisdiction, for the very good reason that it is intended to prevent great mischief. As said by Campbell, C.J., in *Hutchinson v. Greenwood* (1854), 4 E. & B. 324, 326: "The persons really interested as landlords never would appear themselves, if they could cause an appearance to be entered in the name of a pauper tenant and defend the suit without risk to themselves of having to pay the plaintiff's costs."

This is a case in which the equitable rule should be applied in ordering the real applicant, Hamilton, to pay these costs, and that will be the order of the Court. Order to pay \$384 and costs of application to the corporation.

[An appeal from the judgment of the Chancellor was heard by a Divisional Court on the 15th January, 1912. Judgment was reserved.]

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## [IN THE COURT OF APPEAL.]

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KAISERHOF HOTEL CO. v. ZUBER.

Dec. 7.

*Mortgage—Power of Sale—Duty of Mortgagee—Sale at Fair Value—Conduct of Sale—Conditions—Withdrawal of Bid—Collusion between Mortgagee and Purchaser—Slight Evidence of.*

The judgment of a Divisional Court, 23 O.L.R. 481, dismissing an action to set aside a sale of land under the powers of sale contained in certain mortgages, was affirmed.

APPEAL by the plaintiffs from the judgment of a Divisional Court, 23 O.L.R. 481, allowing the appeal of the defendants Zuber and Roos from the judgment of CLUTE, J., at the trial, in favour of the plaintiffs, and dismissing the action.

October 2 and 3. The appeal was heard by MUSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, J.J.A.

*M. A. Secord*, K.C., for the plaintiffs. The finding of the trial Judge that the defendants Zuber and Roos were acting in concert should not have been set aside. There was ample evidence to justify his finding as to collusion between these defendants, which was expressly based upon his opinion as to the credibility of the witnesses. It was the duty of the defendant Zuber to have made an attempt to obtain a price for the property large enough to pay the mortgage and leave a surplus for the owner: *Smith v. Hunt* (1902), 4 O.L.R. 653. The respondent Roos had, at the sale, made a larger offer for the property than was subsequently accepted from him, and an effort should have been made to hold him to his first offer: *Roberts v. Bozon* (1825), 3 L.J. Ch. 113. The mortgagee cannot be a purchaser of the mortgaged property, either directly or indirectly; he must act *bonâ fide* and without collusion with any prospective purchaser; and the finding of the trial Judge as to the understanding between these defendants is supported by the evidence, and should not be interfered with.

*G. H. Watson*, K.C., for the defendants Zuber and Roos. There was no sacrifice of the property at the mortgage sale, as it was in fact sold for a very fair price, and there is no substantial evidence of undervaluation before the Court. The learned

trial Judge erred in the view of the case taken by him throughout the hearing, that the mortgagee, in relation to the sale proceedings, stood in the position of a trustee for the owners of the equity of redemption. This error runs throughout the judgment, and its effect was to place the mortgagee in a more difficult and responsible position than that which he should occupy. There is no evidence to justify the finding of the trial Judge that there was an understanding between the respondents before the sale; and it is clear from the evidence that the sale was conducted fairly and honestly in all respects. It is also shewn by the evidence that an attempt was made by fictitious biddings to run the property up to a price in excess of its sale value; and the auctioneer was justified in refusing to accept Fish's bid of \$43,500, and in putting up the property again. In these circumstances, the defendant Roos was quite within his legal rights in withdrawing his prior bidding of \$43,000. The following cases and authorities were referred to, in addition to those cited in the argument before the Divisional Court, 23 O.L.R. at pp. 484, 485; *Hunter's Sale under Mortgage*, pp. 319, 320; *Holder v. Jackson* (1862), 11 C.P. 543.

*Scord*, in reply.

December 7. Moss, C.J.O.:—This action was tried without a jury by Clute, J., who gave judgment in favour of the plaintiffs. Upon appeal by the defendants to a Divisional Court, the judgment at the trial was reversed and the action dismissed: 23 O.L.R. 481.

The plaintiffs now appeal and seek a restoration of the first judgment.

The plaintiffs were the owners of the equity of redemption in certain premises in the town of Berlin, being a hotel property, which was subject to three mortgages, the second and third of which were owned and held by the defendant Zuber, to whom they had been assigned by the defendants Alfred A. Pipe and Charles B. Dunke, respectively. The defendant Zuber having taken proceedings to sell the premises under the powers of sale contained in these mortgages, this action was commenced

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against Zuber, Pipe, and Dunke to restrain the sale, and an interim injunction was obtained from the Judge of the County Court of Waterloo. In consequence thereof, the sale was adjourned from time to time pending the disposal of a motion before a Judge of the High Court to continue the injunction until the trial. The learned Judge by whom the motion was finally heard refused to continue the injunction; and, on the 15th July, 1910, the premises were put up for sale by auction, and were ultimately knocked down to the defendant William Roos, who was declared the highest bidder at the price of \$39,500.

By deed dated the 4th August, 1910, and registered the next day, the defendant Zuber, under and in pursuance of the powers of sale, conveyed the premises to the defendant Roos.

Thereafter the plaintiffs discontinued the action as against the defendants Pipe and Dunke; and, on the 24th November, 1910, obtained an order allowing them to add Roos as a party defendant, with a view to impeaching the sale to him.

The statement of claim subsequently delivered set forth numerous objections to the sale and its validity, several of which are completely displaced by the evidence given at the trial, such as, that the lands were not fully and properly advertised, and that no sufficient public notice was given of the different postponements of the sale. The main objections were: that the sale was not conducted in a fair, open, and proper manner; that the defendant Roos was not the highest bidder; that the conditions of sale were unduly onerous; that there was an arrangement between the defendants Zuber and Roos whereby the premises were to be knocked down to Roos at a price much less than their value; and that the defendant Roos was acting as agent for the defendant Zuber in purchasing the premises, and the sale was not *bonâ fide*.

The learned trial Judge condemned the conditions of sale, because they did not furnish fuller information with regard to the first mortgage, subject to which the premises were to be sold, and as to existing leases and mechanics' liens, and because the amount to be deposited by the purchaser was put at twenty per cent., and because only seven days were given to the purchaser within which to make objections to the title.



There was no evidence that any one was deterred from becoming a bidder at the sale by reason of any of the conditions of sale, or that they tended in any way to dampen the sale. The advertisement stated that any one desiring it could obtain full information and particulars upon application to the vendor's solicitors.

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There was no misstatement as to any matter material to be known; and, in substance, the form indicated by Con. Rule 721 was followed. See *Holmested and Langton's Forms and Precedents*, 2nd ed., Form No. 1035. Neither in sales by the Court nor outside of the Court is it intended that the advertisement and conditions should contain all that may be desirable for an intending bidder to know. It is only necessary to inform him where it may be had. Nor do the conditions with regard to the deposit or the title seem to have had any prejudicial effect upon the minds of any one desiring to bid for the property.

In any case, these objections could not affect Roos's right to hold his purchase, in the absence of proof that he was a party to the preparation of the advertisement and conditions, or actively intervened in the steps taken towards bringing on the sale, or acted in collusion with the mortgagee. See *Had-dington Island Quarry Co. v. Huson*, [1911] A.C. 722, at p. 727, for the most recent exposition of the law on this subject.

It was well shewn by the evidence that the price obtained was far from being a low price, but the contrary; and, apart from the fact that, owing to the failure of Fish, by whom a bid of \$43,500 was made, to come forward with the deposit required by the conditions of sale, the premises were finally knocked down to Roos at \$39,500, it cannot be said that the sale was a disadvantageous sale in any respect.

This inversion was the outcome of the action of persons for whose conduct neither Zuber nor Roos was responsible. These persons appeared to be acting or to suppose they were acting in the interest of the plaintiffs, their object apparently being to render the sale abortive by making bids running up the price beyond the saleable value of the property. Upon realising that this was the case, the defendant Roos declined, as he was en-

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titled to do, to be bound by his former bids. There was then presented to the defendant Zuber the question whether the sale was to be treated as abortive, and a resale resorted to, involving all the expense of advertising anew and of taking all the other necessary steps for the purpose, or whether to permit the sale to be proceeded with at once. The chances of a new sale proving more advantageous were not apparent; and it cannot be said that Zuber exercised an unwise or unreasonable judgment in allowing the sale to proceed.

Unless, therefore, as put by the learned Chancellor, speaking for the Divisional Court, "the evidence goes to establish the conclusion that the sale was a sham, and that Roos bought the property for the mortgagee, it falls short of what is needed for the success of the plaintiffs:" 23 O.L.R. at p. 487.

A careful perusal and consideration of the testimony does not lead to that conclusion. Apart from the alleged statement of Zuber, testified to by the witness Weber, and the statements alleged to have been made by Roos to the witnesses A. J. Cardy and Sarah Cardy, there is nothing to support the claim of collusion or the agency of Roos.

As regards the first, it could not in any case affect Roos, for it was not made in his presence or communicated to or assented to by him. And as regards the other, apart from the distinct denial given by Roos, supported by the witness Illidge, the alleged statements were altogether too vague to be accepted as proof of an agency to purchase for Zuber. It is unnecessary further to elaborate the details of the testimony bearing on this branch of the case. It has been fully dealt with in the Divisional Court; and, upon the whole case, there appears no good reason for interfering with the judgment appealed from.

The appeal should be dismissed with costs.

MEREDITH, J.A.:—Though it may be that there are some circumstances calculated to excite some suspicion as to the good faith of the mortgagee in the sale of the mortgaged property, yet, when the whole circumstances are reasonably considered, the judgment at the trial cannot be supported.

If the property had been sold at a great undervalue, the things calculated to excite suspicion would become more weighty; but, when it is made quite plain that a reasonable price was obtained, so large a one that no one even now offers more; and when it appears, as it plainly does now, that the purchaser had very good reason for buying for himself; that, indeed, in a business sense, he may fairly be said to have been driven so to purchase; such suspicions fade away entirely, or at least become very faint.

No sort of objection was made before or at the sale, by or on behalf of the plaintiffs, to the conditions of sale or to the proceedings at the sale, in regard to which so much is sought to be made now. No attempt seems to have been made, by them or in their behalf, to get a higher bid, or better price, for the property; indeed, the whole of this litigation seems to me to have arisen out of the fact that the purchaser eventually bought for a sum several thousand dollars less than he at one time bid for it; but, as that bid was forced by one who was unable to carry out his purchase when the property was knocked down to him, and was really not a bid in good faith, it is difficult for me to find any fair ground for holding the purchaser to the bid so forced up, and which was retracted before acceptance, or for any other loss on that account.

The admissions said to have been made by both vendor and purchaser, after the sale, are quite subject to a reasonable and innocent interpretation. The purchaser's interest required that the business of the hotel should be carried on, and that he should have some sort of a "tie" upon it. Keepers of such hotels are not as easily found "as stumps in a field;" and the mortgagee might fairly and properly be looked upon as a possible future keeper, manager, tenant, or even purchaser, without any offence against any rule of law or equity on the part of the real purchaser, who had bought in good faith, for himself, and in his own interests.

There is no reason, in my opinion, for disturbing the conclusion of the Divisional Court; the case is not one in which much depended upon the demeanour of the witnesses; and the

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C. A. learned trial Judge erred in principle in treating the vendor as  
 1911 if he were nothing but a trustee for the sale of the property  
 KAISERHOF for the mortgagor's benefit.  
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GARROW, MACLAREN, and MAGEE, JJ.A., concurred.

*Appeal dismissed with costs.*

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[IN THE COURT OF APPEAL.]

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BENNETT V. HAVELOCK ELECTRIC LIGHT CO.

Dec. 7. *Company—Sale of Property to Company by Director—Agreement with Co-directors—Division of Purchase-money—Rights of Holders of Subsequently Acquired Shares—Absence of Secrecy and Fraud—Affirmance of Transaction by Company.*

The judgment of a Divisional Court, 21 O.L.R. 120, was reversed, upon the facts, and that of BRITTON, J., *ib.*, dismissing the action, restored:—

*Held, per MACLAREN, J.A.,* that the company paid only a fair price for the property; and, if the defendant M. had simply sold it for that sum, and then had compensated the other defendants for the valuable services they had rendered him, there would have been no reasonable ground of complaint. There was no secrecy about the price paid; and there was no fraud. Any irregularities were such as might be condoned by the company; and, the company having, with full knowledge, ratified all that was done, the plaintiffs, who were only urging the claims of the company, could have no higher rights.

*Per MEREDITH, J.A.,* that, if the defendant M. had retained the whole sum of \$5,000, found by the trial Judge to be but a fair price for the water power alone, no one could recover any part of it from him; no attempt had been made to recover from him the share of it retained by him; and no one could, legally or logically, recover any part of the shares which he chose to give to his co-defendants for their assistance. There was no ground for calling the transaction a fraud; it could not be said that the individual defendants were making a profit of their office of trustees for the shareholders; nor was the case like that of a servant receiving a secret commission on purchases made for his master. The right of action, if any, would be that of the company; and the company had repudiated the claims made in this action, and ratified and confirmed the transaction impeached in it.

APPEAL by the individual defendants, other than the defendant Mathieson, from the order of a Divisional Court setting aside the judgment of BRITTON, J., by which the action was dismissed and directing that judgment be entered against the appellants for \$1,000. The reasons for the judgments of BRITTON, J., and the Divisional Court, are reported in 21 O.L.R. 120.

October 5. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

*S. T. Medd* and *R. R. Hall*, for the appellants, argued that the findings of fact made by the learned trial Judge were warranted by the evidence, and relied upon these findings as supporting his judgment. They submitted that there was no evidence to shew that these defendants made any secret profit to the detriment of the plaintiffs, the question being purely one of fact; and the evidence shewed that the defendant Mathieson had agreed, out of his profits, to pay the appellants the sums in question as a consideration for assisting him in financing the company, which, it was clearly proved, they did. There is no evidence of any fraudulent conduct on the part of the appellants; and the plaintiffs are bound by their laches and acquiescence in what was done, and by the ratification of the company. Counsel referred to the cases cited on behalf of the appellants in the prior argument before the Divisional Court especially to *Burland v. Earle*, [1902] A.C. 83; and also to *Gray v. Lewis* (1873), L.R. 8 Ch. 1049, at p. 1050, *per* James, L.J., dealing with *Foss v. Harbottle* (1843), 2 Hare 461; *Palmer's Company Precedents*, 10th ed., pp. 1055-1057, and cases there reviewed; *Lindley on Companies*, 6th ed., p. 772; *Normandy v. Ind Coope & Co. Limited*, [1908] 1 Ch. 84, *per* Kekewich, J., at p. 109.

*D. O'Connell*, for the plaintiffs, did not quarrel so much with the findings of fact of the learned trial Judge as with his interpretation of their legal effect. He referred to *In re Caerphilly Colliery Co.*, *Pearson's Case* (1877), 5 Ch. D. 336, at pp. 340, 356, and to *In re Hess Manufacturing Co.* (1894), 23 S.C.R. 644, the principle of which, it was submitted, covered the case at bar. These defendants, as directors, stood in a fiduciary relationship to the company, and were trustees for future, as well as for present shareholders, and could not be permitted to retain the secret profit made by them in connection with the transaction. As to the alleged ratification by the company, it did not take place until after this litigation had commenced, nor can there be any valid ratification unless full disclosure of all the attendant circumstances has taken place, which is not the

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case here; moreover, it is beyond the power of a company to ratify a fraudulent transaction such as this: *In re Olympia Limited*, [1898] 2 Ch. 153; *Gluckstein v. Barnes*, [1900] A.C. 240; *In re Canadian Oil Works Corporation, Hay's Case* (1875), L.R. 10 Ch. 593. The finding of laches cannot be supported unless there was full and ample notice to the parties interested of the irregularities complained of. Reference was also made, on the question of ratification, to *Palmer's Company Precedents*, 10th ed., p. 69, and cases there cited; also to *Savery v. King* (1856), 5 H.L.C. 627.

*Medd*, in reply.

December 7. MACLAREN, J.A.:—A careful examination of the evidence in this case leads me to the conclusion arrived at by the trial Judge rather than to that of the Divisional Court. With great respect, I am of opinion that the latter erred in looking at the form rather than at the substance of the transaction in question. The form through which the parties went seems to be a clumsy contrivance apparently resorted to by them from a mistaken view of the law. If they had put the transaction through in the form in which their actual agreement, as found by the trial Judge, was made, I am of opinion that it would have been unassailable and not open to the objections brought against it by the Divisional Court.

It has been found that the company paid only a fair price for the property; and, if the defendant Mathieson had simply sold it for that sum, and then had compensated the other defendants for the valuable services they had rendered him, there would have been no reasonable ground of complaint.

The price paid for the property was well known, as there was no secret about it; and there was no fraud.

Any irregularities in the matter were, I consider, such as might be condoned by the company; and, the company having, with full knowledge, ratified all that was done, the plaintiffs, who are only urging the claims of the company, can have no higher rights, and their action should be dismissed.

The judgment of the Divisional Court should be reversed, and that of the trial Judge restored.

MEREDITH, J.A.:—I am quite unable to discover anything discreditable in the conduct of any of the defendants in any of the matters in question in this action. On the contrary, it seems to me that it would be discreditable to the administration of justice if the law took from the individual defendants, who have borne the burden and all the risks of establishing the electric light and power system in question, the money in question for the benefit of other shareholders of the company, who have borne no burden and run no risk in establishing it.

The facts are very simple, and there can be no reasonable doubt as to them.

The defendant Mathieson, recognising the need of a system of electric lighting and electric power in the village of Hayelock, in which he then resided, and still resides, purchased the only water power suitable for that purpose, for \$300, and then sought to have it utilised for that purpose, desiring and asking only the price he had paid for it if the municipal council of the village, or any company, would undertake the work; but he sought in vain; no one seemed willing to undertake the work and incur the risk of failure. He then associated himself with his co-defendants, and they undertook the work and the risk, forming a company for that purpose, but being obliged to pledge their own credit for the debts of the concern; and so not only gave their own time and energy, but also risked their own fortunes in the public enterprise. Under these circumstances, the defendant Mathieson insisted upon getting \$5,000 for the water power; and, having got it, divided it equally among those who were undertaking the work—his four individual co-defendants and himself; and there was surely nothing unfair, much less discreditable, in that; if the enterprise failed, the \$5,000, and possibly all these men were worth, would be lost; whilst, if it succeeded, \$5,000 would be a very reasonable price for the water power, without allowing to them anything for the labours they were undertaking—no small thing—or for the risk they were taking for the benefit of future shareholders—who were risking nothing but the price of their stock and giving no labour—as well as for the public. On what principle, then, can it be said that the latter ought to share equally with the former in the price of the water power?

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The trial Judge found that \$5,000 was but a fair price for the water power alone; and it is not, and could not be, questioned that, if the defendant Mathieson had retained the whole of that sum, no one could recover any part of it from him; and no attempt has been made to recover from him the whole or any part of the share of it retained by him; and, that being so, how can any one, legally or logically, recover any part of the other shares of it which he chose to give to his co-defendants for their assistance?

The case is not at all like the Canadian oil lands cases,\* in which companies were formed for the purpose of taking over oil lands at prices enormously beyond their value; if it were, the transaction could not stand: in this case, there is not a shadow of any sort of ground for calling the transaction a fraud; the company was getting an excellent bargain; the water power was well worth the price; and, beside that, the company was getting the whole work of utilising it done by the enterprise and labour and at the personal risk and on the personal credit of the defendant Mathieson and his associates; and neither the price paid by Mathieson, nor the price paid to him, was a secret; both were well known.

Nor can it be said that the individual defendants were making a profit of their office of trustees for the shareholders: and, if it could, why should the defendant Mathieson not be liable to the same extent as each of his associates? And could it be said, reasonably, that, to the extent of the \$300, there was not any making of a profit of office, but as to the difference between that and the \$5,000 there was; and, if so, why? Not because \$300 was all the water power was worth, because it was worth the \$5,000; and not because \$300 was the price paid for it by Mathieson, because it might be worth nothing, or might be worth very much more, than the price paid for it: if it had been worth nothing, and yet was palmed off at \$300, the transaction could not be upheld; so the price paid is not the criterion, the actual value is; and you cannot take away from the defendant Mathieson any part of that actual value, nor can you any more take it from any one to whom he has chosen to give it or any part of it.

\*See *Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221; *In re Canadian Oil Works Corporation, Hay's Case*, L.R. 10 Ch. 593, *supra*.



Nor, if \$300 were all that could be retained as the price of the water power, could you logically take \$1,000 from each of his associates and nothing from the defendant Mathieson; you should take \$940 from each, leaving the \$300 as the defendant Mathieson chose to leave it—equally divided among the five.

Nor is the case anything like that of a servant receiving a secret commission on purchases made for his master. The real price was \$5,000, there was no discount, nor was there any commission. There was an equal division by the defendant Mathieson, not only of the excess over cost price, but of the cost price also, among the few to be found who had the courage to join in carrying into effect, on their own credit and by their own exertions, this commendable public enterprise; and, in my opinion, it would be discreditable to the administration of justice if, in such a case, those whose credit was not imperilled and whose exertions were not employed in the enterprise could, after it has been by the others carried to a successful issue, come in and take from them their share of the reasonable price of the water power.

And, beside these things, the right of action, if any, would be that of the company; and the company has, at a regular meeting of its shareholders, called for the purpose of considering the question involved in this action, repudiated the claims made in it and ratified and confirmed the transaction impeached in it, a transaction which was not *ultra vires* of the company.

On both grounds, the action, in my opinion, fails, and was rightly dismissed at the trial; I would allow this appeal and restore the judgment, there directed to be entered, dismissing the action.

MOSS, C.J.O., GARROW and MAGEE, JJ.A., concurred.

*Appeal allowed.*

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## [DIVISIONAL COURT.]

D. C.

1911

ROCHFORD V. BROWN.

- Dec. 7. *Municipal Corporation—Application of Funds in Payment of Costs of Officer Incurred in Action against him—Class Action against Councillors to Recover Monies Paid—Status of Plaintiff as Ratepayer—Tenant—Liability for Taxes—Breach of Trust—Trustee Act—Application of.*

The plaintiff, suing as a ratepayer of a town, on behalf of himself and all other ratepayers, claimed from the defendants, who were the members of the town council for the year 1911, a sum of money paid out of the funds of the town corporation, upon the vote of the defendants, to a firm of solicitors for a bill of costs incurred in defending the Chief Constable of the town in an action brought against him and the town corporation. The plaintiff's name was on the assessment slip for 1911 as one of the tenants of a property assessed to the landlord, as freeholder, and the tenants, as occupants; the total amount of taxes being \$15.75, apportioned as between the tenants. There was no proof that the tenants, as between them and the landlord, had to pay the taxes:—

*Held*, that, in a class action such as this, the Court must ascertain by strict proof that the plaintiff has the interest which he alleges and upon which his title to sustain the suit is founded, i.e., as a member of a class standing in the same situation and having one common right and one common interest.

*Hichens v. Congreve* (1828), 4 Russ. 562, and *Olav v. Rufford* (1849), 8 Hare 281, followed.

And *held*, that the plaintiff was only contingently a ratepayer; for, without stipulation to the contrary, the law regards the landlord as the person to pay; and, if the tenant is called on, he can deduct the payment from his rent or be otherwise recouped by his landlord; and the plaintiff's status was of too vague and fugitive a character to justify his interference on behalf of the class.

*Dove v. Dove* (1868), 18 C.P. 424, followed.

*Quare*, as to the pertinence of the Trustee Act, 62 Vict. (2) ch. 15 (O.), to the case of municipal councillors applying municipal funds to the payment of the costs of the Chief Constable of the municipality, in an action against him as an officer of justice acting in the enforcement of the Liquor License Act.

Judgment of DENTON, Jun. Co. C.J. York, affirmed.

APPEAL by the plaintiff from the judgment of His Honour Judge DENTON, one of the Junior Judges of the County Court of the County of York, dismissing an action brought in that Court by Thomas Rochford against A. J. Brown and six other persons.

The action was begun on the 16th March, 1911. The statement of claim was as follows:—

1. The plaintiff was, on the 16th March, 1909, on the assessment roll of the Town of North Toronto for that year, as a

ratepayer of the municipality, and remained so up to the time of the bringing of this action, and now appears on the last revised assessment roll as a ratepayer as aforesaid.

2. The defendants, on the said 16th March, 1911, were members of the council of the Town of North Toronto, and voted as such to pay Messrs. Holman, Drayton, & Monahan, solicitors, the sum of \$240.02 as and for a bill of costs, without any right or authority so to direct; and the said amount was, in pursuance of the vote, paid to the said firm.

3. The plaintiff then, for himself and on behalf of all other ratepayers of the said Town of North Toronto, claims from the said defendants the amount of such bill of costs, with interest from the 6th March, 1909, and the costs of this action, as money which should have been kept to and for his and their use.

The statement of defence was as follows:—

1. The defendants deny the allegations contained in the plaintiff's statement of claim and put the plaintiff to the proof thereof.

2. The plaintiff is not a ratepayer of the Town of North Toronto, and is not entitled to question the legality of the payment referred to in the second paragraph of the plaintiff's statement of claim.

3. The plaintiff in the writ of summons sued personally on his own behalf; and in his personal capacity has no right of action whatever, and is not entitled to claim on behalf of himself and all other ratepayers of the said Town of North Toronto, as claimed in paragraph 3 of the statement of claim.

4. The defendants plead the provisions of sec. 468 of the Consolidated Municipal Act of 1903, and say that, under the provisions of the said section, any such claim as made by the plaintiff hereunder should be made against the said Corporation of the Town of North Toronto alone, and should not be made until after the quashing or repeal of the resolution authorising the payment of the moneys referred to in the 2nd paragraph of the statement of claim, if the same were illegally paid out, which the defendants do not admit but deny, nor until after one month's notice in writing of the intention to bring the action shall have been given to the corporation.

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5. The defendants further plead the provisions of sec. 13 of the statute 1. Geo. V. ch. 22, being an Act to protect public authorities from vexatious actions.

6. The defendants and each of them deny any liability whatever to the plaintiff hereunder, and submit that this action should be dismissed with costs.

The costs paid to the solicitors were the taxed costs of defending, on behalf of one Morris, who was Chief Constable of the Town of North Toronto, an action brought against Morris by one Robinson, on account of Robinson's arrest by Morris, acting as constable: see *Robinson v. Morris* (1909), 19 O.L.R. 633.

The County Court Judge dismissed the action on the ground that, if the payment was illegal or unauthorised, the defendants, having acted honestly and reasonably, were entitled to the protection of the Trustee Act, 62 Vict. (2) ch. 15, sec. 1 (O.)

November 29 and 30. The appeal was heard by a Divisional Court composed of BOYD, C., LATCHFORD and MIDDLETON, JJ.

*J. B. Mackenzie*, for the plaintiff. The defendants had no authority to pay the bill of costs of Morris in the action of *Robinson v. Morris*: Biggar's Municipal Manual, p. 536, and cases referred to in note (j) at the foot of p. 41, and in note (c) at the foot of p. 47. Nor are they protected by the provisions of 62 Vict. (2) ch. 15, sec. 1 (O.): *In re Lands Allotment Co.*, [1894] 1 Ch. 616; *Elgin Loan and Savings Co. v. National Trust Co.* (1903-5), 7 O.L.R. 1, 10 O.L.R. 41; *King v. Matthews* (1903), 5 O.L.R. 228. The plaintiff is a ratepayer, and so is properly entitled to question the legality of the payment on behalf of himself and all other ratepayers: *Patchell v. Raikes* (1904), 7 O.L.R. 470, at p. 475; *Cross v. City of Ottawa* (1864), 23 U.C.R. 288, at p. 292.

*T. A. Gibson*, for the defendants. The plaintiff is not a ratepayer of the Town of North Toronto, and is not entitled to question the legality of the payment of the bill of costs in question. Neither is he entitled to claim on behalf of himself and all other ratepayers of the Town of North Toronto: *Baxter v. Kerr* (1876), 23 Gr. 367.

*Mackenzie*, in reply, referred to *Holcomb v. Shaw* (1862), 22 U.C.R. 92, and *Warne v. Coulter* (1866), 25 U.C.R. 177. He also referred to the statute. 4 Edw. VII. ch. 23, sec. 2, sub-secs. 6, 12; sec. 33, sub-secs. 3, 4; sec. 46, sub-sec. 1; and schedule F. to the Act; secs. 66, 67, 89, 91, 92 and 103 (1), clauses 1 and 2.

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December 7. The judgment of the Court was delivered by BOYD, C.:—This is a class action, in which the plaintiff undertakes to sue as a ratepayer representing and on behalf of all the ratepayers of the Town of North Toronto. This method of procedure is permissible on the ground stated by Lord Lyndhurst in *Hichens v. Congreve* (1828), 4 Russ. 562, 577, where all the class stand in the same situation and have one common right and one common interest: then one of such class can sue for the benefit of all the others. And it is laid down that, in dealing with such actions, the Court must ascertain by strict proof that the party by whom the cause is conducted has the interest which he alleges and upon which his title to sustain the suit is founded: *Clay v. Rufford* (1849), 8 Hare 281.

The question here is (as put by the plaintiff's counsel), was the plaintiff a ratepayer at the time of bringing the action, i.e., on the 16th March, 1911? He is on the assessment slip for that year as one of the tenants of a property assessed to the landlord, as freeholder, and the tenants, as occupants; the total amount of taxes being \$15.75, not apportioned as between the tenants. There is no proof given that the tenants have to pay the taxes as between them and the landlord; and, *prima facie* and in the absence of evidence, the landlord is the real ratepayer. Without stipulation to the contrary, the law regards the landlord as the person to pay. *Dove v. Dove* (1868), 18 C.P. 424, so decides; and the law is still the same, though the present provision in the statute (Assessment Act of 1904, sec. 92\*) appears in a form abbreviated from that in use at an earlier period.

\*92. Any tenant may deduct from his rent any taxes paid by him which as between him and his landlord the latter ought to pay.

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Boyd, C.

The owner is primarily liable; and, if the tenant is called on to pay taxes, he pays only *sub modo*, for he can deduct the payment out of his rent or otherwise be recouped by his landlord. He may be regarded as contingently a ratepayer; but, as was admitted on the argument, no one can say whether he will have to pay the taxes or not for the year (1911). His interest as an absolute ratepayer does not appear; and he cannot, being a tenant (who, if called on, deducts his taxes from his rent), be regarded as representing the body of ratepayers who are primarily and ultimately liable to pay. In contemplation of law, the landlord is, in such circumstances, the ratepayer, and not his tenant.

There are ratepayers and—ratepayers. A tenant who is possibly liable to pay taxes, and who, if the possibility happens, can recover what is paid from the landlord, is not in the same class as the ratepayer who is fixed with the charge from the outset, and who has to pay out of his own pocket. One who, as tenant, is liable for taxes which he can deduct from his rent, has by no means the same measure of interest in the financial condition of the municipality as the ratepayer who must pay without recourse.

This plaintiff is not a proper representative of the body of ratepayers, who alone are interested in the money now sought to be recovered as assets of the municipality. The evidence given is in accord with this result. The witness called by the plaintiff (who was also the town clerk) said that the plaintiff is not and is not looked on as a ratepayer for this year, 1911, and it has not been proved that he is or that he will be. Hence his alleged status of ratepayer is of too vague and fugitive a character to justify his interference on behalf of the class he undertakes to represent.

I prefer to place my judgment on this ground rather than on that which appears in the judgment below. Many grave questions arise as to the pertinence of the Trustee Act, 62 Vict. (2) ch. 15 (O.), to a municipal corporation applying municipal funds to the payment of costs of their Chief Constable in an action against him as an officer of justice acting in the en-

forcement of the Liquor License Act. I do not find it needful to discuss these questions on this record and at the suit of this plaintiff.

Judgment affirmed with costs.

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[DIVISIONAL COURT.]

CHANDLER & MASSEY LIMITED v. IRISH.

D. C.  
1911  
Dec. 15.

*Company—Illegal Disposition of Assets—Acquisition by Shareholder of Shares in Another Company—Breach of Trust—Winding-up of Company—Right of Liquidator to Follow Assets.*

*Held*, affirming the judgment of BOYD, C., 24 O.L.R. 513, that, without consideration or legal authority, \$1,000 of the plaintiff company's funds was applied in payment for certain shares standing in the defendant's name; that the moneys so misapplied were trust funds; and the trust attached to the shares purchased with the trust funds.

APPEAL by the defendant from the judgment of BOYD, C., 24 O.L.R. 513.

December 4 and 5. The appeal was heard by a Divisional Court composed of MULOCK, C.J.Ex.D., CLUTE and SUTHERLAND, JJ.

*H. E. Rose*, K.C., for the defendant, argued that it was not shewn by the evidence that the plaintiffs' cheque by which the defendant's stock in the new company was paid for was their own money, or that it was improperly paid. The cheque is not produced; and it does not appear against what account it was charged. The defendant was not aware of anything being wrong in the transaction, and it is not shewn where the money came from. The plaintiffs in order to succeed in the action should have established that the money represented by the cheque was improperly paid; but the Court is left to guess as to this: *Johnson v. Royal Mail Steam Packet Co.* (1867), L.R. 3 C.P. 38, *per* Willes, J., at p. 43. There can be no consent without knowledge; and the defendant did not know where the money was coming from. The learned trial Judge has passed over what was the real issue in the case; and there is no evid-

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ence that the money of the old company was "illegally applied" in the purchase of the defendant's stock in the new company, as stated in the judgment, or that the assets of the old company were depleted by the transaction. *Crandall v. Lincoln* (1884), 51 Conn. 73, which is relied on by the plaintiffs, does not, as to some points, represent the law in this country.

*A. C. McMaster*, for the plaintiffs, argued that the defendant was put upon inquiry, and must be deemed to have had notice of the real nature of the transaction. He gave no consideration for the shares allotted to him in the new company, which were paid for by the plaintiffs' money. He is, therefore, not entitled to hold them as against the plaintiffs: *Trevor v. Whitworth* (1887), 12 App. Cas. 409, discussed in Lindley on Companies, 6th ed., p. 721, shews that the transaction was *ultra vires* of the company.

*Rose*, in reply, referred to the wide powers given to companies under sec. 17 (d) of the Act of 1907, and argued that the Court should not unduly enlarge the doctrine as to the following of trust funds.

December 15. The judgment of the Court was delivered by MULLOCK, C.J.:—This is an appeal from the judgment of the Chancellor, who held that the plaintiffs, here represented by Osler Wade, their liquidator, were entitled to ten shares of stock in Chandler Ingram & Bell Limited, standing in the name of the defendant, Irish.

During the argument of the appeal, it was conceded by counsel that, when settling the formal judgment, the parties agreed that, in lieu of its directing a transfer of the stock, it should order the defendant to pay to the plaintiffs the sum of \$1,000. On this appeal, Mr. Rose argued the case as if the learned Chancellor had declared the plaintiffs to be creditors of the defendant for \$1,000.

In view of the fact that the change of relief given the plaintiffs was by consent of the parties, their rights on this appeal should be determined as if the formal judgment was in accordance with the learned Chancellor's judgment, in which case the question for us to determine is, whether the plaintiffs are entitled to the stock in question.



Mr. Rose argued that, having regard to the statement of claim,\* it was not competent for the learned Chancellor to have made an order in respect of the stock, but that he was confined to the one issue, viz., whether the plaintiff was entitled to a return of the \$1,000 in question.

The statement of claim clearly sets forth a case which, if established, would entitle the plaintiffs to the stock in question and not to a payment of money, the only defect in the statement of claim being that the relief asked for was a return of the money. Whether that or a delivery of the stock is the appropriate remedy is a matter of law; and it was quite competent for the learned Chancellor, having reached the conclusion that the plaintiffs were entitled to the stock, to have permitted an amendment of the prayer, and such amendment may now be made.

The facts of the case are set forth in the report of the case in 24 O.L.R. 513. The learned Chancellor found as a fact that the sum of \$1,000, funds of the plaintiffs, was applied in payment to Chandler Ingram & Bell Limited of \$1,000 owing that company by the defendant in respect of the ten shares of stock subscribed for by him, and that the defendant gave no consideration to the plaintiffs for such application of their funds. The evidence, I think, fully warrants such finding.

As to the plaintiffs having so paid the money, there is no doubt. The defendant, however, seeks to shew that, by some personal agreement between himself and Mr. Chandler, president of the plaintiff company, the latter had personally agreed to pay up the \$1,000 owing upon the ten shares standing in the defendant's name. Chandler, however, failed to make good such personal undertaking, but, instead, used the company's funds.

For this money the defendant gave no consideration. It was argued for the defendant that the shareholders of the plaintiff company had authorised the transaction; and, in support of that contention, the defendant points to the resolution of shareholders set forth in the statement of claim. The authorisation by such resolution was conditional on the defendant agreeing that he should not be entitled to any further dividends

\*Set out in 24 O.L.R. 513.

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on certain stock held by him in the plaintiff company, or to any share in its assets, and in the meantime to transfer such stock to the president of the plaintiff company in trust for them. The onus is on the defendant, who relies on the resolution, to shew that he has complied with its conditions. This he has not done. The stock stood in his own name, and he handed to Mr. Chandler, president of the plaintiff company, a stock certificate of his being such shareholder. That act, however, did not deprive him of his status as a shareholder and all the rights incident thereto. Thus the resolution never became operative, and the liquidator is not by the resolution estopped from following the funds.

Further, the resolution purposes to authorise the payment in consideration of alleged services rendered by the defendant; but in his evidence he admits having rendered no services. It is thus clear that the only consideration for the payment of the \$1,000 was the return of the defendant's shares in the plaintiff company—an illegal consideration which deprives the resolution of any validity. Thus the bald fact remains that, without consideration or legal authority, \$1,000 of the plaintiff company's funds was applied in payment for certain shares standing in the defendant's name. The moneys so misapplied are trust funds, and the trust attaches to the shares purchased with the trust funds.

If the defendant so elects, the judgment may be amended to conform to the Chancellor's decision; otherwise to stand as issued. With this exception, the appeal should be dismissed with costs.

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[DIVISIONAL COURT.]

McLELLAN v. McLELLAN.

D. C.  
1911  
Dec. 19:

*Gift—Cheques on Banks—Presentment and Payment after Death of Donor—Notice of Death—Bills of Exchange Act, secs. 127, 167—Gift inter Vivos—Gift Mortis Causa—Delivery of Bank Pass-books to Donee—Purpose of—Evidence.*

The judgment of BOYD, C., 23 O.L.R. 654, affirmed.

APPEAL by the defendant from the judgment of BOYD, C., 23 O.L.R. 654.

October 20. The appeal was heard by a Divisional Court composed of MULOCK, C.J. Ex.D., TEETZEL and CLUTE, JJ.

*C. R. McKeown*, K.C., for the defendant. The deceased having given to the defendant a cheque for \$2,500 and other cheques in blank, and having given at the same time his bank-books for the accounts covered by these cheques, a good *donatio mortis causâ* was established, even though in the case of the \$2,500 cheque there were in the bank-book a few dollars more than the cheque represented: *Brown v. Toronto General Trusts Corporation* (1900), 32 O.R. 319; *McDonald v. McDonald* (1903), 33 S.C.R. 145, and the cases therein referred to. The money was paid over by the bank to the defendant, after the death of the testator, with full knowledge of the death; and the bank could, therefore, not recover the money from the defendant; and the executors, the plaintiffs, are in no better position in that respect than the bank: *Nightingale v. City Bank of Montreal* (1876), 26 C.P. 74; *Chambers v. Miller* (1862), 32 L.J.C.P. 30; *Rogers v. Ingham* (1876), 3 Ch. D. 351.

*I. B. Lucas*, K.C., for the plaintiffs. The plaintiffs might have sued the bank but for the order in the nature of an interpleader; that relieves the bank, upon payment of the fund into Court; and the order directing the issue, unappealed from, binds all parties, and leaves the simple issue as to who is entitled to the moneys represented by the cheques. In any case, as the bank and the defendant both knew that the moneys belonged to the testator's estate, the executors can follow it: *Hopper v. Conyers* (1866), L.R. 2 Eq. 549; *Frith v. Cartland* (1865), 2 H. & M. 417; *In re Hallett & Co.*, [1894] 2 Q.B. 237. And there is no necessity for identification when moneys are in the hands of trustees: *Lupton v. White* (1808), 15 Ves. 432; *Hancock v. Smith* (1889), 41 Ch. D. 456; Snell's Principles of Equity, 15th ed., p. 434. Even if it can be said that the bank, in transferring the money to the plaintiffs' credit, actually paid it to the plaintiffs, the plaintiffs in the present action might recover as for money had and received: Addison on Contracts, 9th ed., p. 306. There was no evidence that the gift of either the pass-book or the cheque was conditioned to take effect after the death of the donor, which is always one of the

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attending conditions necessary to constitute a valid *donatio mortis causâ*. The gift was, in this case, part of the fund only, and left a substantial balance at the credit of the account; and there cannot, therefore, be said to have been a gift of the pass-book: *In re Mead, Austin v. Mead* (1880), 15 Ch. D. 651; *McDonald v. McDonald*, 33 S.C.R. 145; *Bouts v. Ellis* (1853), 17 Beav. 121, in appeal (1853), 4 DeG. M. & G. 249. But the cheque is not an assignment of the money in the bank, and the bank's authority is revoked by death: Bills of Exchange Act, secs. 127 and 167; *Re Bernard* (1911), 2 O.W.N. 716, and cases there cited. The learned Chancellor finds that the deceased did not intend to make a *donatio mortis causâ*, but, at the most, to make the defendant executor under a nuncupative will; and, therefore, the bequest fails. This is a finding upon a question of fact, to be arrived at from all the circumstances, and the finding should not be disturbed: *Solicitor to the Treasury v. Lewis*, [1900] 2 Ch. 812; *Dole v. Lincoln* (1850), 31 Me. 422.

December 19. The judgment of the Court was delivered by TEETZEL, J.:—A perusal of the evidence and the authorities reviewed by the learned Chancellor, in his very carefully considered judgment (and others cited upon the argument), leaves in my mind no room to doubt either the correctness of his findings of fact or conclusions of law. Because the death of a donor of a cheque drawn by him, before it is presented to his banker, operates as a revocation of the authority to pay the cheque, it has been repeatedly held that the delivery of such a cheque cannot be a good *donatio mortis causâ*, in the absence of very special circumstances such as existed in *Bouts v. Ellis*, 17 Beav. 121, and in appeal, 4 DeG. M. & G. 249.

The latest case in support of this proposition is *Re Bernard*, 2 O.W.N. 716, wherein, at p. 717, the learned Chief Justice of the Exchequer Division says: "The authorities are quite clear that a cheque not paid, either actually or constructively, during the lifetime of the drawer, is not capable of being the subject of *donatio mortis causâ*. . . . A cheque is not a chose in action, but merely a direction to some one, who may or may not

have in his possession funds of the drawer, authorising him to pay to the payee a certain sum of money. Death of the drawer before presentation revokes such authority."

There is not the slightest evidence here of any special circumstances which would take the case out of this authority and the decisions therein cited. As the pass-book handed by the deceased to the defendant with a cheque for \$2,750 shewed that there was to his credit over \$2,800, and as it is not pretended that the deceased intended the gift to be of more than the amount of the cheque, the case falls short, upon the evidence, of coming within such cases as *In re Mead*, *Austin v. Mead*, 15 Ch. D. 651; *In re Dillon*, *Duffin v. Duffin* (1890), 44 Ch. D. 76; and *Brown v. Toronto General Trusts Corporation*, 32 O.R. 319, where it is held that, a pass-book and all the money represented thereby may be the subject of a good *donatio mortis causâ*. The pass-book was only given to the defendant to facilitate the collection of the \$2,750.

It is also clear from the defendant's evidence that there was no restriction placed by the deceased against the defendant getting the cheque cashed during the donor's life, and that there is nothing to indicate that it was only to be collectible in case of the donor's death; all of which is inconsistent with the idea of a gift *mortis causâ*, but is consistent with a gift *inter vivos*; and the Courts do not give effect to a gift *inter vivos* which is imperfect by non-delivery of the subject-matter. That the deceased did not intend to restrict the defendant from collecting the cheque, thereby making the gift complete before his death, or impose a condition that it should be collected only after his death, and that the defendant was unaware of the consequences of the donor's death before presentation of a cheque, is shewn by the following extracts from the defendant's evidence:—

"Q. You say you did not present these cheques until after the death? A. Because I thought they were just the same as a claim, that it didn't make any difference whether they were cashed or not. I didn't know at that time that there was any difference between cashing a cheque from a man who was living and a man who was deceased. I thought the cheque would be

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good fifty years or ten years or six years after anyway, with the same limitations as a note. . . . At the time he gave me the cheque, I asked him what I would do with it, would I cash it? and he said it didn't make any difference, that he guessed it was good, the money was there."

I cannot profitably add more to the reasons set forth in the judgment appealed from, which should be affirmed and the appeal dismissed with costs.

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[IN CHAMBERS.]

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 Dec 20

RE C., AN INFANT.

*Infant—Illegitimate Child—Custody—Rights of Mother and Putative Father.*

The mother of an illegitimate child, four months old, was awarded the custody as against the putative father.

The desire of the mother of an illegitimate child as to its custody is primarily to be considered. The dominant matter for the consideration of the Court is the welfare of the child—taking "welfare" in its widest sense. To deprive the mother of the custody, it is not enough to shew that the child will be well cared for by the putative father; he must also shew that the mother is, for some real reason, unfit to be intrusted with the care of her child.

*The Queen v. Barnardo*, [1891] 1 Q.B. 194, *Barnardo v. McHugh*, [1891] A.C. 388, *In re McGrath*, [1893] 1 Ch. 143, and *The Queen v. Gyngall*, [1893] 2 Q.B. 232, followed.

MOTION by the mother of an illegitimate child, upon the return of a *habeas corpus*, for an order awarding the applicant the custody of the child.

December 19. The motion was heard by MIDDLETON, J., in Chambers.

*Gideon Grant*, for the applicant.

*N. W. Rowell*, K.C., for the putative father.

December 20. MIDDLETON, J.:—The child is at present in the custody of the mother of the putative father, who claims to hold it for him.

The putative father is a married man, living with his wife, who has no children; and the intention is that he, his mother,

and his wife, shall reside together, and that his mother shall assume the actual care of the child.

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In the material no charge of unfitness is made against the mother. She has no means of her own, but her relations have given her a home, and she is now in a position to maintain her child. It is said that she voluntarily placed the child with the mother of the putative father. This is denied.

I am not in a position to compare the respective ability of the parties or finally to pass upon the question, as it was arranged that I should consider the legal aspect of the case, in the first instance, and then deal, on oral evidence, with any question of fact that may remain. I, therefore, assume for the present the good faith of both parties.

In the earlier cases, there is to be found some difference of opinion as to the rights of the mother of an illegitimate child, and even yet the true principle upon which her rights are founded may be the subject of discussion; but in *The Queen v. Barnardo*, [1891] 1 Q.B. 194, affirmed in [1891] A.C. 388, *sub nom. Barnardo v. McHugh*, enough is said to shew how the matter should be dealt with.

There an illegitimate child had been placed in Dr. Barnardo's home, with the full and free consent of the mother. She changed her mind and demanded her child. Much was said against the mother's moral character. Lord Coleridge, C.J., giving the judgment of the Divisional Court ([1891] 1 Q.B. at p. 199), accepts as applicable to this application by the mother of an illegitimate child, as against a stranger, the law laid down in *Regina v. Clarke* (1857), 7 E. & B. 186, that "the immorality to extinguish the right of the parent or guardian to the custody of the child must be of a gross nature, so that the child would be in serious danger of contamination by living with him."

In appeal, Lord Esher says, ([1891] 1 Q.B. at p. 207), after discussing the facts: "As to the law, the child is illegitimate. That fact makes a difference with respect to the position of the mother before the Court; but I am of opinion that it makes no difference whatever with respect to her right to the custody of the child. In this respect there is no difference

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whatever between the rights of the mother of an illegitimate child and the rights of the father or mother, if there is no father living, of a legitimate child. What are the rights of the mother of a legitimate child? It is her undoubted right, if there is no father living, to have the company and care of, and the control over, her own child. . . . In the present case the child is in the actual care of Dr. Barnardo, being there of the mother's own free will. More than that, she has by an agreement undertaken not to take the child away. The law is perfectly clear that parents cannot bind themselves by any such agreement. No such agreement can deprive a parent of the right of absolute control over his or her own child. This applies precisely to the mother of an illegitimate child. She cannot, by any agreement, absolve herself from the duty of taking care of it. . . . The Court is bound to give effect to the wish of the mother, even though the child be illegitimate, unless there is some good reason to the contrary." After a discussion by the Court of the evidence upon which it was alleged that the mother was a disreputable woman, she was awarded the child, though there was no real reason, apart from her wish, to take it from the home where it had been well cared for. Lord Justice Lindley (p. 211) refers to *Regina v. Nash* (1883), 10 Q.B.D. 454, as having put an end to the controversy as to the mother's rights: "It is now settled, after some fluctuation of opinion, that the mother of an illegitimate child has a *prima facie* right to the custody of the child up to the age of fourteen in preference either to the reputed father or to any other person. This right is based on the relationship which exists between a mother and her child, and on the absence of all superior rights on the part of the reputed father or of any one else. This right of the mother is no doubt subject to control by the High Court, and if in any case it be proved that a mother is unfit to have the custody of her own illegitimate child, the Court clearly has jurisdiction to remove the child from her control. . . . But the Court will not interfere with her arbitrarily, and will support her and give effect to her views and wishes unless it becomes the duty of the Court towards the child to refuse so to do. . . . I see no reason why a mother



should not from time to time change her mind as to where, how, or by whom her child shall be brought up, nor why the Court should interfere with her or refuse to support her, unless circumstances be proved which satisfy the Court that its duty to the infant requires it to act contrary to her wishes." The circumstances are then investigated, and it is said (p. 211): "The fact that she lived with a man without being married to him is not of itself sufficient to deprive her of her rights."

In the Lords, Lord Halsbury says ([1891] A.C. at p. 395): "Whether the right is, as Lindley, L.J., expresses it, a *primâ facie* right to the custody of the child, or whether it be the settled view of the Court of Equity that the mother's wishes ought to be consulted, if she has not forfeited the right to be consulted by any misconduct of her own, seems to me to be immaterial to decide, since I am of opinion that no misconduct is established against the mother which disentitles her to exercise her right to be considered in respect of the custody of this child." Lord Herschell says, with reference to the proposition that the mother of an illegitimate child has all the rights which a father possesses with regard to legitimate children, which the Courts below had regarded as established, that he does "not feel satisfied that the authorities do establish that proposition," but regards this as of no importance, as the cases do shew, and with this he concurs (p. 399), "that the desire of the mother of an illegitimate child as to its custody is primarily to be considered. Of course, if it can be shewn that it would be detrimental to the interest of the child that it should be delivered to the custody of the mother . . . the Court, exercising its jurisdiction, as it always does in such a case with a view to the benefit of the child, would not feel bound to accede to the wishes of the mother."

The subsequent cases of *In re McGrath*, [1893] 1 Ch. 143, and *The Queen v. Gyngall*, [1893] 2 Q.B. 232, are authoritative expositions of the principles which ought to regulate the Court in the exercise of its discretion to remove a child from its parent's control; and, though in these cases the religious element is present, the general rules form a safe guide. Lord Esher ([1893] 2 Q.B. at p. 242) quotes Knight Bruce, V.-C., who

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says in *In re Fynn* (1848), 2 DeG. & S. 457, that the Court "must be satisfied, not only that it has the means of acting safely and efficiently, but also that the father has so conducted himself, or has shewn himself to be a person of such a description, or is placed in such a position, as to render it not merely better for the children, but essential to their safety or to their welfare, in some very serious and important respect, that his rights should be treated as lost, or suspended—should be superseded or interfered with. If the word 'essential' is too strong an expression, it is not much too strong." And Lord Esher adds: "I will not say 'essential,' but—clearly right for the welfare of the child in some very serious and important respect." And again: "The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word 'welfare' must be taken in its widest sense. . . . *Primâ facie* it would not be for the welfare of the child to be taken away from its natural parent."

This infant is now about four months old, and it would require the strongest possible evidence of the mother's unfitness to justify my interference. From the course the motion has taken, I cannot now pass upon this question; the respondent may have the opportunity of giving evidence upon this head, if he sees fit to do so; but he must realise that it is not enough to shew that the child will be well cared for by the putative father and his mother; he must also shew that the applicant is, for some real reason, unfit to be intrusted with the care of her child.

Apart from everything else, it seems to me that it cannot be lightly assumed that the child, as it grows up, would find a suitable home with its putative father and his wife. Her attitude toward the child is not shewn. If the respondent desires evidence to be given, he may so elect, and an appointment can be arranged. If he does not, then the mother must have her child, and her costs.

[No further evidence was given, and an order in favour of the mother was issued.]

## [IN THE COURT OF APPEAL.]

REX v. MUNROE.

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Dec. 12.

Dec. 21.

*Criminal Law—Vagrancy—Criminal Code, sec. 238(a)—“Visible Means of Maintaining himself”—Money Derived from Begging—Previous Conviction for Begging.*

Under a town by-law, a magistrate convicted the defendant of begging, and sentenced him to twenty days' imprisonment. The same magistrate also convicted the defendant of being a vagrant—a person without visible means of support—under sec. 238(a) of the Criminal Code, and sentenced him to six months' imprisonment, the two terms to run concurrently to the extent of the twenty days. At the time of his arrest the defendant had in his pocket \$28, gathered by begging. After he had served the twenty days, he applied, upon *habeas corpus*, for his discharge:—

*Held*, that the objection that the defendant was being punished twice for the same offence was not sustained by anything appearing in the return to the writ: so far as appeared, the offences were entirely different.

It was contended that, as the defendant had \$28 in his possession at the time of his arrest, he was not without “visible means of maintaining himself,” and so was not a vagrant:—

*Held*, that sec. 238(a) of the Code requires more than the mere possession by the person charged of temporary means of support. The circumstances appearing in the evidence shewed that, apart from the possession of the \$28, the defendant was not in the way of maintaining himself in such a manner that he was not likely to become a public burden or a nuisance in the streets. He was shewn to be a beggar; and he was living without other employment. The magistrate was entitled to look at all the circumstances; and he came to a reasonable conclusion.

Order of Boyd, C., refusing to discharge the defendant, affirmed.

*Per Boyd, C.*:—The true meaning of “visible means” is visible lawful means. Persons who live without labour or visible means of support and idle away their time are mischievous and dangerous persons, who must either support themselves by unlawful means or become an undue charge on the public charity, and who are consequently nuisances to society in general.

*Regina v. Riley* (1898), Q.R. 7 Q.B. 198, 200, approved and followed.

*The King v. Sheehan* (1908), 14 Can. Crim. Cas. 119, 120, not followed.

MOTION by the defendant, on the return of a *habeas corpus*, for an order for his discharge from custody under a conviction for vagrancy.

The defendant, under a local by-law of the Town of Kenora, was convicted of begging, and was sentenced to twenty days' imprisonment. He was also convicted of vagrancy—being a man without visible means of maintaining himself—under sec. 238(a) of the Criminal Code, and was sentenced to six months' imprisonment, the latter term to run concurrently with the former. It appeared that at the time of his arrest he had \$28 in his pocket. He was a deaf mute, and appeared to be incapable

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of earning a living by labour. The \$28 was gathered by begging, which is illegal by sub-sec. (d) of sec. 38. The magistrate held that the defendant was a vagrant.

After the defendant had served his sentence of twenty days under the conviction for begging, he applied for his discharge from imprisonment under the conviction for vagrancy, upon the grounds that the \$28 constituted visible means of support; that, if the sentence had actually been imposed for begging, he had already been convicted for that offence; and that it was necessary to charge him specifically as a beggar in order to convict him under sub-sec. (d).

December 5. The motion was heard by BOYD, C., in Chambers.

*M. L. Gordon*, for the defendant.

*J. R. Cartwright*, K.C., for the Crown.

December 12. BOYD, C.:—The vagrancy clauses of the Canadian Criminal Code are derived from the English general Vagrancy Act (still in force, 5 Geo. IV. ch. 83, secs. 3 and 4), and in small part from the later Act 1 & 2 Vict. ch. 38, sec. 2: see marginal note to Dominion statute 49 Vict. ch. 157, sec. 8; *Rex v. Johnson*, [1909] 1 K.B. 439. Many of the phrases reappear *verbatim* in the Code. Thus, in the Act of 1824, sec. 3, we find that any person wilfully refusing to maintain himself “by work or by other means . . . every person wandering abroad . . . in any public place . . . to beg or gather alms . . . shall be deemed an idle and disorderly person.” And in sec. 4, “every person pretending . . . to tell fortunes, or using any subtle craft . . . to . . . impose on any of His Majesty’s subjects; every person wandering abroad and lodging in any . . . outhouse . . . not having any visible means of subsistence, and not giving a good account of himself . . . every person wandering abroad and endeavouring by the exposure of wounds or deformities to obtain or gather alms . . . shall be deemed a rogue and vagabond.”

It is inherently evident from this legislation that the man who makes a living by begging or by gambling or by trickery,

is not regarded as a person who maintains himself by honest work or other lawful means. Begging is stamped as being a disreputable mode of life and an offence against the good order of society.

Our Code declares a man to be a vagrant who, not having any visible means of maintaining himself, lives without employment. The maintaining himself by means of begging, and the gathering of such gains to the extent of a few dollars, would not seem reasonably sufficient to exonerate him from punishment because with the dollars he might be said to have visible means of maintaining himself for a few days or weeks. He would be still living as a beggar, not having any legal means of subsistence, the same as before he had begun to save. As said by Mr. Justice Osler in *Regina v. Bassett* (1884), 10 P.R. 386, it is the general trend of his life that is to be looked at, the sort of character he is exhibiting.

I am persuaded that the true meaning of the section in the Code, 238 (a), that every one is a vagrant "who . . . not having any visible means of maintaining himself, lives without employment," is visible *lawful* means of support. This word "lawful" is expressed in the criminal laws of Australia relating to idle and disorderly persons or vagrants: *Appleby v. Armstrong* (1901), 27 Vict. L.R. 136, and *Lee Fan v. Dempsey* (1907), 5 Commonwealth L.R. 310.

I am willing to adopt the language of Wurtele, J., in *Regina v. Riley* (1898), Q.R. 7 Q.B. 198, 200, where it is said: "The paragraph of the article of the Code relating to vagrancy, which makes it an offence for any one not having visible means of maintaining himself to live without employment, is founded on the ground that persons who live without labour or visible means of support and idle away their time are mischievous and dangerous persons, who must either support themselves by unlawful means or become an undue charge on the public charity, and who are consequently nuisances to society in general. The mere fact of living without employment is not an offence against the law, if the person . . . is able to do so, because he has sufficient means either belonging to himself or which are provided for him in a legitimate way."

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See, also, *Regina v. Organ* (1886), 11 P.R. 497, 500.

In *Rex v. Collette* (1905), 10 Can. Crim. Cas. 286, 10 O.L.R. 718, there was evidence that the defendant had means of earning a livelihood.

The defendant moves for his discharge, on the ground that, as he had \$28 in his possession at the time of his arrest, he was not "without visible means of maintaining himself," and so is wrongly convicted as being a loose, idle vagrant under the Criminal Code of Canada, sec. 238(a).

The sole authority relied on is a decision of Hunter, Chief Justice of British Columbia, in *The King v. Sheeham* (1908), 14 Can. Crim. Cas. 119, 120, in which he held that a person who had some \$27 in his possession at the time of his arrest was not without means of support, though this money had been derived from gambling.

In the present case, the money found on the defendant was derived from begging on the cars and in the streets, and he has also been convicted, under a by-law of the Town of Kenora, of the offence of begging in the streets, and sentenced to twenty days' imprisonment (now expired). The argument is, that he has been punished for begging, has expiated his offence by serving his time, and is now lawfully in possession of the money. Concurrent convictions for both offences, *i.e.*, of begging in the streets against a by-law, and that of being a vagrant under the Criminal Code, are not inconsistent. The one is addressed to a particular act; the other, to a manner of life. If the defendant has no visible means of maintaining himself, in the ordinary sense of the phrase (except by begging), and if he leads an idle, wandering life in that way, and is not able to give a good account of himself, one cannot but feel that he is within the mischief against which the statute is directed. Begging is one of the ingredients of vagabondage—the old time collocation was, "rogues, vagabonds, and sturdy beggars." I would not give effect to such a reading of the Act as this: that a man unlawfully engaged in gambling or begging, who is possessed of a few dollars collected from that source, is to be treated as meeting the requirements of the statute as one who has an employment and is in possession of visible means of maintaining himself. His means and his employment and his

maintenance are all attributable to his disreputable life, and the more he bestirs himself in this pursuit, the greater nuisance he becomes.

I do not feel disposed to follow the case from British Columbia as a correct exposition of the Code, and will dismiss this application.

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The defendant appealed to the Court of Appeal.

December 21. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, and MAGEE, JJ.A.

*J. W. Bain*, K.C., and *M. L. Gordon*, for the defendant. The defendant was convicted of begging; and, consequently, if the Crown desired to have him convicted of vagrancy, it could not base the case against him on any series of actions as a beggar, which would be the case if he was to be convicted of having no visible means of support, having regard to the \$28 found on his person, which was obtained by begging. Under sec. 7 of the Habeas Corpus Act, the Court is bound to consider whether \$28 is visible means of support. We contend that it is. There is no doubt that the magistrate convicted the prisoner because he deemed him a burden to the community; the conviction should have been on some specific charge. Reference to the cases cited by the Chancellor, and to those collected in a note to *The King v. McCormack* (1903), 7 Can. Crim. Cas. 135.

*J. R. Cartwright*, K.C., for the Crown, was not called upon.

At the close of the argument for the defendant, the judgment of the Court was delivered by MOSS, C.J.O.:—We are of opinion that the order of the learned Chancellor should be affirmed. It has been argued on behalf of the defendant that, if the conviction be allowed to stand, the defendant will be punished twice for the same offence. This point does not appear to have been raised before the Chancellor in its present form; the first conviction was put forward for another purpose. But there is nothing to shew that the first conviction was for the same offence as that upon which the conviction before us was founded. So

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far as appears, the offences were entirely different. And the objection is not sustained by anything appearing in the papers certified to us.

The main argument against the conviction has been that, as the defendant had \$28 in his possession at the time of his arrest, he was not without "visible means of maintaining himself," and so was wrongly convicted as being a vagrant under sec. 238(a) of the Criminal Code. It was urged that the bare possession by the defendant of this sum of money was conclusive proof of "visible means of maintaining himself." We think that the statute intends something more than the mere possession of temporary means of supplying himself with food and lodging for a few days. The circumstances appearing in the evidence shewed that, apart from the possession of the \$28, almost entirely the proceeds of begging, he was not in the way of maintaining himself so that he was not likely to become a public burden or a nuisance in the streets. He was shewn to be a beggar. It appeared that he had himself prepared a paper in which he stated that he was unable to work, or did not intend to work, or words to that effect, and asked for alms and contributions, but he had no certificate from one of the persons named in sec. 238(d) of the Code, which would justify his soliciting alms from the public. And he was living without other employment. The magistrate was entitled to look at all the circumstances surrounding the possession of the \$28, and to form his own conclusion upon them as to whether the defendant was possessed of "visible means of maintaining himself." We do not think that the magistrate took an unreasonable view of the evidence in concluding that the defendant was not a person of that class, but was in fact a person not having visible means of maintaining himself, living without employment, within the meaning of sec. 238(a) of the Code.

The appeal will be dismissed.

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*Vendor and Purchaser—Contract for Sale of Land—Authority of Agent of Vendor to Make—Receipt Signed by Agent in his own Name—Memorandum in Writing to Satisfy Statute of Frauds—Name of Principal not Disclosed—Different Documents Relating to Same Transaction to be Read as one—Terms of Sale—Names of Vendor and Purchaser—Signature by Initials in Body of Document.*

Authority to an agent to sell land gives authority to sign a binding contract for sale.

Review of the authorities.

A memorandum in writing may be sufficient to satisfy the Statute of Frauds, sec. 4, although it does not disclose the name of the real vendor, the principal, if it discloses the name of the agent who has authority to bind the vendor.

Review of the authorities.

The defendant's title to the land in question was under the K. agreement to purchase, upon which there was a balance of unpaid purchase-money, the defendant's "equity" being worth about \$1,000. An estate agent drew the plaintiff's attention to the land, and got him to make an offer. The agent then saw the defendant and told him that he had a purchaser, naming the offer. The agent and the defendant discussed the terms, and afterwards the defendant told the agent that he would sell on the terms proposed; and the agent then said that, if he could sell on those terms, he would do so without consulting the defendant further, and the defendant said that that was satisfactory. The plaintiff told the agent that he would take the property on those terms; and the agent then told the defendant that he had sold the property, and the defendant said "all right." The agent then received \$200 from the plaintiff, and gave him a written receipt therefor, signed by himself (the agent), expressed to be "account purchase" of the land, describing it, stating the purchase-price, the terms of payment, and the rate of interest upon deferred instalments. In setting out the terms, the words "balance of equity about \$1,000 equally on Dec. 11 and June 12" were used. The vendor's name was not mentioned in the receipt, but the agent, at the same time that he wrote the receipt, wrote on the stub thereof the vendor's name with certain other particulars. The defendant made a contemporaneous entry in his pass-book of a sale to the agent at the same price and on the same terms as those mentioned in the receipt, using in one place the words, "balance of O'B. equity payments Dec. and June"—O'B. being the initials of the defendant's name:—

*Held*, that the agent had authority to sell and to sign a binding contract for sale, and that the receipt alone was a memorandum sufficient to satisfy the Statute of Frauds.

*Semble*, that certain figures set down on paper at the interview between the agent and the defendant, the receipt given by the agent, and the entry made by the defendant, all related to the same transaction, and might all be read together.

*Semble*, also, that the receipt and the memorandum on the stub should be read as one, and would constitute a memorandum giving the names of both vendor and purchaser.

*Semble*, also, that the initials appearing in the body of the entry made by the defendant was a sufficient signature by him.

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ACTION by purchaser against vendor for specific performance of a contract for the sale and purchase of land. The defences were: a denial of a contract within the Statute of Frauds; and a denial of authority to sell.

December 11 and 12. The action was tried before CLUTE, J., without a jury, at Sault Ste. Marie.

*J. E. Irving, K.C.*, for the plaintiff.

*A. C. Boyce, K.C.*, for the defendant.

December 21. CLUTE, J.:—The plaintiff is a land speculator, and resides at Moose Jaw; the defendant is an hotel-keeper, and resides in Sault Ste. Marie.

In June last, the plaintiff came to one Pardee, a member of the firm of Wilcox and Pardee, real estate brokers in Sault Ste. Marie, and intimated that he desired to buy real estate in that town. Pardee did not have the defendant's property upon his list for sale at that time, but shewed the plaintiff other properties, a number of which he bought. Pardee then brought to his attention the land in question, and got him to make an offer. As a result, Pardee went to see O'Brien and told him that he had a purchaser, naming his offer.

At this time, O'Brien held under the "Keenan agreement" to purchase, upon which there was a balance of unpaid purchase-money. O'Brien and Pardee discussed the terms. O'Brien wanted a third cash, and his equity of about \$1,000 to be paid in December and June following, and the balance to be paid as provided in the Keenan agreement. He promised to telephone Pardee the same evening.

The papers upon which they figured, I find, were the papers produced in Court, exhibits 1 and 2. They shew that the price was \$225 per foot, 28½ ft. x 132 ft., one-third down, balance of equity one-half December, 1911, one-half June, 1912, balance as per agreement, \$500 September and March each year, 7 per cent. The further figures appearing upon the papers, of

"6,412.50

"4,788.00

---

"\$1,624.50,"

were shewn to be the sale-price, the price which O'Brien paid for the property, and the difference between the two. "Balance as per agreement" was shewn to be the balance of purchase-money under the Keenan agreement, under which O'Brien claimed, and in which he had an equity of about \$1,000.

They parted without reaching a conclusion. O'Brien promised to call up Pardee the same evening by telephone. This he did not do. On the following day, Pardee called him up. He was not in; and, after about fifteen minutes, O'Brien called up Pardee, and stated that he would sell on the proposed terms.

And I find that Pardee said, on this occasion, that, if he (Pardee) could sell on these terms, he would do so without consulting O'Brien further, to which O'Brien said that that was satisfactory.

The plaintiff came in to Pardee's office shortly after, and was told by Pardee that he was ready to sell, on terms settled between Pardee and O'Brien, and the plaintiff said he would take the property on those terms. I find, further, that Mr. Pardee then called up O'Brien, and told him that he had sold the property, and O'Brien said "all right." Pardee asked O'Brien, "who was looking after his property?" meaning who were his solicitors? and he said "Boyce and Hayward." Pardee then signed the following receipt and received \$200 from Maybury: "Sault Ste. Marie, June 16th, 1911. Received from Alfred W. Maybury two hundred dollars account purchase 28½ ft. x 132, being pt. lot 19, N. Queen adjoining Sault Star Bldg. on East, Price 225.00 per front ft., terms 200.00 down, balance of \$1,937.00 after approved title & documents, 500.00 in Sept. & March, balance of equity about \$1000.00 equally on Dec. 11 and June 12, remainder semi-annually about \$500.00 in Sept. & March each year until paid. Interest 7%, purchase-price \$6412.50. Wilcox and Pardee, by Jno. B. Pardee." And at the same time wrote on the stub as follows: "Date June 16th, 1911, Name Alfred W. Maybury, Address a/c purchase for Wm. O'Brien property 28½ feet adjoining Star Building, \$200 check."

Mr. Pardee then handed the receipt to Mr. Irving, who was the plaintiff's solicitor in the matter. Mr. O'Brien made the following entry in his pass-book:—

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1911	June 15	Sold 281½ feet N. Queen to J. B. Pardee
MAYBURY		Price \$225 per foot, one 1/3 cash
v.		Total purchase-price
O'BRIEN.		6412.50
		1/3 cash, \$2132.50
		Balance of O'B. equity payments Dec. & June
		interest 7%
		Keenan payments to be assumed as per agreement
		Cost of property
		4788.00
		<hr/>
		\$1624.50

In my opinion, the terms contained in the receipt and the O'Brien entry mean the same thing.

The defendant's solicitor drafted an agreement, which, the plaintiff's solicitor insisted, changed the terms; and, after some correspondence, the solicitor for the plaintiff rested upon the memorandum already made as sufficient evidence of the contract.

Mr. Pardee states on cross-examination that there was to be a formal agreement, and that was the reason he handed the receipt to the solicitor; that he was to conduct the negotiations; that the formal contract was to be prepared by the solicitor. He did not tell the defendant that he had given the receipt, nor that he had received the \$200.

He further states that in the interview with O'Brien, he was trying to get the best terms he could for Maybury, and O'Brien for himself. O'Brien had not in fact left the property with Pardee for sale prior to the interviews he referred to. Pardee and O'Brien substantially agreed as to the terms of the bargain; and, upon reference to the Keenan agreement, it becomes perfectly clear what the bargain was.

1. Mr. Irving contends that, upon the evidence, Pardee was authorised to sell, and, therefore, to sign a note or memorandum within the Statute of Frauds; and that the receipt signed by him, either alone or coupled with the stub, which was written at the same time, may be read as evidence of what the contract was; and reference may be had to the Keenan agreement to explain the terms.

2. That the document in O'Brien's handwriting is sufficient under the statute, and that "O.B." appearing in the body of that document is a sufficient signature by him within the statute.

3. And that, although that purports to be a sale by O'Brien to Pardee, the plaintiff is entitled to intervene as the undisclosed principal.

Mr. Boyce contends that there is no binding contract, and also relies on the Statute of Frauds.

I may mention that, at the close of the plaintiff's case, the defendant called no evidence; but, after Mr. Irving had completed his argument, and Mr. Boyce had in part replied, the case was reopened, and I permitted the defendant to call his witnesses.

The fact that no evidence was called at first by the defence I took to be a tribute to the accuracy of the statement made by Mr. Pardee. Whether this be so or not, I accept his evidence as against the defendant's where they differ.

There is no doubt in my mind that Pardee and O'Brien had agreed upon the terms of the contract for sale. The question still remains whether Pardee was authorised to enter into a binding contract on behalf of O'Brien. If so, it must arise from what took place when Pardee called up O'Brien by telephone after the interview. Was Pardee authorised to sell the property without further communication with O'Brien? He swears that he said to O'Brien that, if he could sell on these terms, meaning the terms that O'Brien said he would accept, he, Pardee, would do so without considering him further, and O'Brien said that was satisfactory. I think this was an authority to sell, that is, to close a bargain on those terms; and, if there was authority to sell, it would seem that that gave the authority to sign a binding contract for sale.

The question has been referred to in a number of cases.

In *Hamer v. Sharp* (1874), L.R. 19 Eq. 108, 112: "The question is whether, when an owner of an estate puts it into the hands of an estate agent for sale, stating a price for and giving particulars of the property to enable him to inform intending purchasers, but giving no instructions as to the absolute disposal, and none as to the title of the property, and mentioning

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none of those special stipulations which it might be proper to insert in conditions in reference to the title, that is sufficient authority to the agent to sign a contract for the sale of the property for the price stated in the instructions, without making any provision whatsoever as to title." In that case Hall, V.-C., held that the alleged contract was not one which the Court would decree to be carried into effect.

Buckley, J., in *Rosenbaum v. Belson*, [1900] 2 Ch. 267, commenting on this decision, points out (pp. 270, 271) that in *Saunders v. Dence* (1885), 52 L.T. 644, 646, Field, J., distinguished *Hamer v. Sharp*, saying that "all that Hall, V.-C., in that case decided, as I understand it, was that if you go to an estate agent, and tell him you have a property to sell, and that you want a purchaser, and you tell him what you have made up your mind shall be the price, and to a certain extent what shall be the conditions, and you instruct him to try and find a purchaser, that is not sufficient, under those circumstances, to authorise the agent to make a contract without any conditions whatever with regard to the title." Buckley, J., then proceeds: "I have been unable to find any case in which it has been held that instructions given by A. B. to sell for him his house, and an agreement to pay so much on the purchase-price accepted, are not an authority to make a binding contract, including an authority to sign an agreement."

In *Godwin v. Brind* (1868), L.R. 5 C.P. 299 (note), the advertisement intimated that, "to treat and view," applications were to be made to a certain person.

In *Chadburn v. Moorc* (1892), 61 L.J. Ch. 674, instructions were not in writing, but the learned Judge found that the agent was authorised to find a purchaser for the houses and to negotiate a sale.

In *Prior v. Moore* (1887), 3 Times L.R. 624, the owner instructed an estate agent to put the property on his books as for sale and informed him of the lowest price he would accept.

In these cases it was held that the agent was not authorised to sign a contract.

In *Wilde v. Watson* (1878), L.R. 1 Ir. 402, Vice-Chancellor Chatterton says, at p. 405: "A house or estate agent has no

implied or general authority to conclude a contract for sale; his duty is to find a purchaser or tenant, and communicate his offer to his principal."

A number of these cases turn upon the question of title. In the present case, accepting the evidence of the witness Pardee, as I do, he was authorised to do more than find a purchaser. It was known that there was a purchaser in view, and he was authorised to sell without further consulting the defendant; and, after he had closed the sale, as he thought, he called up the defendant and informed him that he had sold the property, and O'Brien then said it was all right. Having regard to the circumstances of this case, I think that what took place between O'Brien and Pardee amounted to an authority, not simply to negotiate, but to sell, and that Pardee had authority to sign a binding contract.

The next question is, whether there is a sufficient memorandum to satisfy the 4th section of the Statute of Frauds.

The receipt delivered to the plaintiff does not, it is said, disclose the name of the vendor; but it was urged on behalf of the plaintiff that the entry upon the stub of the book in which the receipt was written, does sufficiently disclose the vendor; and that, as this was one piece of paper written at the same time, it is a sufficient memorandum within the statute.

The case chiefly relied upon by the plaintiff to support this view is *Pearce v. Gardner*, [1897] 1 Q.B. 688. There it was held that an envelope and a letter which is shewn by evidence to have been enclosed in it are so connected together that the envelope may be used to supply the name of one of the parties to a memorandum in writing of a contract within the Statute of Frauds.

In *Laythoarp v. Bryant* (1836), 2 Bing. N. C. 735, it was held that the defendant was bound, where he signed a memorandum for purchase on the back of a paper containing the particulars of the premises, notwithstanding that it was not signed by the vendor, where the particulars referred to the auctioneer as selling for the vendor; and see *Hinde v. Whitehouse* (1806), 7 East 558; *Kenworthy v. Schofield* (1824), 2 B. & C. 945; *Coles v. Trecothick* (1804), 9 Ves. 234.

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It appears to me, however, that the receipt does disclose Wilcox and Pardee as the vendors; and, as will be shewn later, the principal may be bound.

In *Kennedy v. Oldham* (1888), 15 O.R. 433, the question of what is a sufficient memorandum is discussed. There an offer to purchase land was signed by the defendant in an offer-book kept by a firm of land agents, who were authorised by the plaintiff to sell the land, and was verbally accepted by the agents. The offer was not addressed to any one, but the book was marked on the back with the initials of the agents. Previous to the offer, letters had been written between the defendant and the agents in which an offer at a lower price was made and refused for the same land. After the second offer was accepted, the defendant's solicitors corresponded with the agents of the plaintiff about the title, referring in their first letter to the land which the defendant had purchased from the agents. It was held that the initials on the book might be read into the offer to supply the name of the vendor, and that these with the correspondence constituted a sufficient agreement within the Statute of Frauds to bind the defendant.

Some of the cases referred to by Street, J., in *Kennedy v. Oldham*, bear indirectly upon the present issue.

In *Ridgway v. Wharton* (1857), 6 H.L.C. 238, " 'instructions' were referred to in a letter, and it was held that parol evidence might be given to shew that instructions had been given in writing and that there were no other instructions than the document produced."

In *Baumann v. James* (1868), L.R. 3 Ch. 508, "a letter referred to 'the rent and terms agreed upon,' and it was held that this entitled the plaintiff to give parol evidence to shew that the rent and terms mentioned in a report and letter, not otherwise connected with the later letter, were those intended."

In *Long v. Millar* (1879), 4 C.P.D. 450, "the word 'purchase' in a receipt was held to mean 'agreement to purchase,' and to let in parol evidence of a previous agreement which was incomplete under the Statute of Frauds unless treated as incorporated with the receipt."

In *Cave v. Hastings* (1881), 7 Q.B.D. 125, "the defendant in a letter to the plaintiff referred to 'our arrangement for



the hire of your carriage,' and this was held to entitle the plaintiff to shew by parol that the only arrangement for the hire of his carriage was a memorandum which the plaintiff had signed agreeing to let his carriage to the defendant for a year, and thus to complete the evidence of a contract in writing signed by the defendant."

A number of cases are also referred to by Armour, C.J., in *Kennedy v. Oldham*.

In *Newell v. Radford* (1867), L.R. 3 C.P. 52, the initials of the parties were held sufficient, and parol evidence was allowed to shew who they were.

In *Sarl v. Bourdillon* (1856), 1 C.B.N.S. 188, the name of the plaintiff on the fly leaf at the beginning of an order-book in which were written the names of the plaintiffs was held sufficient to satisfy the Statute of Frauds.

See also *Salmon Falls Manufacturing Co. v. Goddard* (1852), 14 Howard (S.C.U.S.) 446, where parol evidence was admitted shewing the usage and practice in the trade, and where the signature by initials of one of the parties was held to be sufficient to take the case out of the statute.

See also *Jacob v. Kirk* (1839), 2 Moo. & R. 221, where, the vendor's name not appearing in the book signed by the vendee, it was held not to be sufficient to satisfy the statute.

In *Knight v. Crockford*, (1794), 1 Esp. 190, 5 R.R. 729, it was held that an agreement beginning "I, A.B.," though not otherwise signed by the party, is good within the statute.

In *Ogilvie v. Foljambe* (1817), 3 Mer. 53, 17 R.R. 13, it is said that, provided the name be inserted in such a manner as to have the effect of authenticating the instrument, the provision of the instrument is complied with, and it does not signify in what part of the instrument his name is to be found.

And see *Stokes v. Moore* (1786), 1 R.R. 24, 1 Cox Eq. 219. There the objection was, that this authentication was wanting, the name being introduced incidentally in the middle of the paper, and referring in grammatical construction only to a single term in the conditions.

See Fry on Specific Performance, 5th ed., p. 263, secs. 516 and 517.

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A written statement, to satisfy the statute, should contain, either expressly or by necessary inference, all the terms of the contract; that is to say, the parties described either by names or descriptions or reference sufficient to preclude any fair dispute as to their identity: *Potter v. Duffield* (1874), L.R. 18 Eq. 4.

The subject of the contract, the consideration, and the terms should leave nothing open to future treaty: *Fry on Specific Performance*, p. 257, sec. 504.

No formality is required, nor does it signify at all what is the nature and character of the document containing such written statement, whether it be a letter written by the party to be charged to the person with whom he contracted, or to any other person, or deed or other legal instrument, or an affidavit; sec. 505.

"The Court is not in quest of the intention of parties, but only of evidence under the hand of one of the parties to the contract that he has entered into it. Any document signed by him and containing the terms of the contract is sufficient for that purpose:" *per* Bowen, L.J., in *In re Hoyle*, [1893] 1 Ch. 84, 99. In the same case, p. 100, A. L. Smith, L.J., intimated that an entry in a man's own diary, if it were signed by him and the contents were sufficient, would do.

In *Oliver v. Hunting* (1890), 44 Ch. D. 205, Kekewich, J., points out the difference between the old and the new rule as to what may be read and when parol evidence may be given to shew what the document referred to was, and to go further than that, and "if you find a reference to something, which may be a conversation, or may be a written document, you may give evidence to shew whether it was a conversation or a written document; and, having proved that it was a written document, you may put that written document in evidence, and so connect it with the one already admitted or proved;" and, on reference to later cases that have gone further, citing *Long v. Millar*, 4 C.P.D. 450, followed by Field, J., in *Cave v. Hastings*, 7 Q.B.D. 125, he refers with approval to Lord Justice Bramwell's judgment in *Long v. Millar*, where he gives this illustration: "Suppose that A. writes to B., saying that he will give £1,000 for B.'s estate, and at the same time states the terms in detail, and sup-

pose that B. simply writes back in return, 'I accept your offer.' In that case there may be an identification of the documents by parol evidence, and it may be shewn that the offer alluded to by B. is that made by A., without infringing the Statute of Frauds, sec. 4, which requires a note or memorandum in writing." "If that is sound," as Kekewich, J., observes, "it is difficult, perhaps, to say where parol evidence is to stop; but substantially it never stops short of this, that wherever parol evidence is required to connect two written documents together, then that parol evidence is admissible. You are entitled to rely upon a written document, which requires explanation." And "that you are always entitled in regarding the construction and meaning of a written document to inquire into the circumstances under which it was written, not in order to find an interpretation by the writer of the language, but to ascertain from the surrounding facts and circumstances with reference to what, and with what intent, it must have been written."

On examining the figures set down on exhibits 1 and 2 at the interview of O'Brien and Pardee, the receipt given by Pardee, and the entry made by O'Brien, it is clear, I think, that they relate to the same transaction; and, under the cases, I am inclined to think that they may all be read together; but, with the view I take of this case, it is unnecessary to decide this question.

*Rossiter v. Miller* (1878), 3 App. Cas. 1124, deals with the question as to a future formal agreement. Lord Cairns, at p. 1138, quotes Lord Westbury as using these words in *Chinnock v. Marchioness of Ely* (1865), 4 DeG. J. & S. 638, 645: "'I entirely accept the doctrine contended for by the plaintiff's counsel, and for which they cited the cases of *Fowle v. Freeman* (1804), 9 Ves. 351, *Kennedy v. Lee* (1817), 3 Mer. 441, and *Thomas v. Dering* (1837), 1 Keen 729, which establish that if there had been a final agreement, and the terms of it are evidenced in a manner to satisfy the Statute of Frauds, the agreement shall be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although it may be an express term that a formal agreement shall be prepared and signed by the parties.

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As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged or his agent lawfully authorised, there exist all the materials which this Court requires to make a legally binding contract.' Up to that point it appears to me that these words exactly describe the case which your Lordships have before you. But the words which are relied upon by the learned Judges in the Court of Appeal are the words which follow: 'But if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation.' "

If it can be ascertained who is the vendor, from some document which is sufficiently connected with the memorandum by clear reference, that will cure the defect of the memorandum: *Williams v. Jordan* (1877), 6 Ch. D. 517, 520; *Warner v. Wilington* (1856), 3 Drew. 523, 530.

"The fact that a simple acceptance of an offer contains a statement that the acceptor has instructed his solicitor to prepare the necessary documents does not render the acceptance a conditional acceptance:" *Bolton Partners v. Lambert* (1889), 41 Ch. D. 295.

"Where a Court has to find a contract in a correspondence, and not in one particular note or memorandum formally signed, the whole of that which had passed between the parties must be taken into consideration:" *Hussey v. Horne-Payne* (1879), 4 App. Cas. 311.

Taking the receipt with the counter-foil, which at the time it was signed was one piece of paper, and, therefore, a memorandum which, I am inclined to think, should be read as one, it appears that Alfred W. Maybury is purchasing the property of William O'Brien, which consists of 28½ feet adjoining the Star building on the east, and being part of lot 19 on the north side of Queen street. I think, however, that the receipt signed by Pardee, without the counter-foil, is sufficient to satisfy the statute.

The price is \$225 a foot, \$200 down, and the balance of \$1,937.50 after approval of title, the balance of equity in De-

cember, 1911, and June, 1912, the remainder semi-annually in September and March in each year, interest 7 per cent., purchase-price \$6,412.50.

This is the amount mentioned by O'Brien in his memorandum in his pass-book, in which he refers to "balance of O'B. equity payments Dec. & June, interest 7%, Keenan payments to be assumed as per agreement."

It appears from the entry made by Pardee, and also that made by O'Brien, that the interest of the vendor was an equity. The reference in the receipt to "balance of equity about \$1,000," etc., makes it necessary to ascertain what equity is referred to, and so is sufficient to bring in the Keenan agreement, which then shews what the payments are, and corresponds with those mentioned in the memorandum. It was objected that the intention of O'Brien was, that one-third should be paid down upon signing the agreement. I do not think that is the meaning of the memorandum, either of the one made by Pardee or by himself. O'Brien held an equity. At the price he was selling, which is clearly indicated in the memorandum, it left him a margin of profit. The plain meaning, I think, is, that one-third was to be paid in cash, that is, when the transaction was closed; and the fact that the \$200 was paid down as an evidence of good faith at the time the memorandum was signed by Pardee, and only the balance called for at the time the title was passed, does not seem to me to alter the intention of the parties. This would in fact be a payment of one-third cash, although the \$200 was paid before the formalities were concluded. Although the note made by O'Brien refers to Pardee as the purchaser, that does not preclude the real purchaser from intervening.

It has long since been held that "it is competent to shew that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals: and this, whether the agreement be or be not required to be in writing by the Statute of Frauds; and this evidence in no way contradicts the written agreement:" *Higgins v. Senior* (1841), 8 M. & W. 834, 844; *Rossiter v. Miller*, 3 App. Cas. 1124; *McCarthy v. Cooper* (1885), 12 A.R. 284.

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I have no manner of doubt that the defendant intended to sell and the plaintiff intended to buy the land in question for the price and on the terms stated. I have also no doubt that, when O'Brien was called up and authorised the sale upon the terms which he and Pardee had arranged, he intended that Pardee should do what was necessary to conclude the sale. The carrying of it out, of course, would be left to his solicitors. It being apparent upon the face of the memorandum made by Pardee that O'Brien was selling an equity, it was then open to inquire "What equity?" and this would bring the Keenan agreement in, and permit it to be read as part of the transaction.

Whether the initials appearing in the body of the note or memorandum made by O'Brien is a sufficient signature by him, it is unnecessary, in the view I take of the case, to decide. I am inclined to think, however, that it is; the land is described, the price, the purchaser, and the terms of payment; and, upon looking at the Keenan agreement, from which it would be ascertained that O'Brien held the equity, and that after one-third cash had been paid the balance of the equity was to be paid to O'Brien in December and June with interest at 7 per cent., and that further payments under the Keenan agreement were to be assumed, the whole agreement could, I think, be made out. How that may be, it is unnecessary for me to decide, having regard to the view I take of the memorandum signed by Pardee. The plaintiff is entitled to specific performance and his costs of action.

Of course, any payments made by O'Brien on the Keenan agreement must be refunded with interest.

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[IN THE COURT OF APPEAL.]

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RE JOHNSTON AND TOWNSHIP OF TILBURY EAST.

Dec. 22.

*Municipal Corporations—Drainage—Township By-law Authorising Raising of Money to Pay for Work Done without By-law—Absence of Engineer's Report—Condition Precedent—Assessment—Municipal Drainage Act, sec. 77—Motion to Quash By-law—Discretion—Position of Applicant—Waiver—Estoppel.*

A by-law passed by a township council on the 26th September, 1910, purporting to be a by-law for the repair and maintenance of existing drainage works in the township and for borrowing a sum to complete the same, was not in fact intended to provide for the doing of any work under it, but was passed solely for the purpose of recouping the township corporation in respect of repairs and improvements already made and paid for by the council to an amount exceeding \$800, without a report from an engineer, a by-law, or an assessment:—

*Held* (MEREDITH, J.A., dissenting), that the by-law must be quashed for illegality.

Order of the Drainage Referee reversed.

*Per* GARROW, J.A.:—Where proceedings for the original construction of a drain are instituted under the Municipal Drainage Act, they begin by a petition, followed by an engineer's report. Both are in the nature of conditions precedent, required to found jurisdiction in the council to charge and assess the lands in the drainage area for the expense of the work. If subsequent repairs are required, and the cost exceeds \$800, they fall within sec. 77 of the Act, which, while dispensing with the petition required by sec. 3, expressly requires a report; and only when the council has received and formally adopted such a report may it undertake the work "specified in the report," for the doing of which the engineer is given all the powers to assess provided in respect of an original work. Section 89 implies an assessment lawfully made, upon the faith of which money has been advanced out of the general fund. There was no proper evidence of estoppel on the part of the appellant seeking to have the by-law quashed, even if estoppel could arise in respect of a statutory condition precedent conferring jurisdiction. The Court has a discretion on an application to quash a municipal by-law; but the discretion is a judicial one, not to be exercised arbitrarily; and there was nothing in the circumstances to justify the Court in exercising it in favour of the by-law.

*Per* MEREDITH, J.A.:—The appellant waived his right, as he might, to the proceedings not taken; and was estopped from seeking the unjust advantages which he was seeking in this proceeding.

*Township of McKillop v. Township of Logan* (1899), 29 S.C.R. 702, discussed.

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AN appeal by James Johnston from an order of George F. Henderson, Esquire, K.C., Referee under the Drainage Laws, pronounced on the 8th February, 1911, dismissing an application made by the appellant and others, under the provisions of the Municipal Drainage Act, for an order quashing by-law No. 17 of 1910, passed by the Municipal Corporation of the Township of Tilbury East, the respondents, on the 26th September, 1910, intituled "A By-law for the Repair and Maintenance of the Forbes Drainage Works in the Township of Tilbury East and for Borrowing on the Credit of the Municipality the Sum of \$7,599 for Completing the same," and for an order declaring void, invalid, and illegal so much of the by-law as sought to assess the lands of the applicants for the work contemplated thereby or any part thereof, and to have it declared that the applicants were not liable to pay the assessments against them

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or their lands respectively under the provisions thereof, and for an injunction, or order in the nature thereof, restraining the respondents from collecting from the applicants and the rate-payers generally, or the applicants and other persons whose lands were sought to be assessed under the by-law, the assessments thereby respectively made against their lands.

The drainage works in question were constructed in 1887 for draining lands by embankment and pumping.

October 3 and 4. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

*O. L. Lewis*, K.C., and *W. E. Gundy*, for the appellant. The judgment of the learned Referee, which was pronounced with hesitation and apparently with the expectation that it would be the subject of an appeal, turns to a large extent on the meaning and effect of sec. 77 of the Municipal Drainage Act of 1910, under which it is a condition precedent to the validity of such a by-law as is now in question that it should be based upon the previous report of an engineer appointed by the municipal council. No such report exists, and the work done was, therefore, unauthorised, and the respondents have no right to pass a by-law to raise the money required in order to meet the expenditure incurred. The assessments made in pursuance of the by-law are wrong in principle, inasmuch as the engineer has charged all lots in the drainage area with injury liability. The by-law is also defective in that it does not properly describe the lands proposed to be assessed. Reference was made to the following cases and authorities: *Alexander v. Township of Howard* (1887), 14 O.R. 22, especially at pp. 43, 44; *Re Jenkins and Township of Enniskillen* (1894), 25 O.R. 399; *McCulloch v. Township of Caledonia* (1898), 25 A.R. 417; *Burke v. Township of Tilbury North* (1906), 13 O.L.R. 225, cited in Proctor's Drainage Laws, p. 157; *Grierson v. Municipality of Ontario* (1852), 9 U.C.R. 623.

*M. Wilson*, K.C., and *J. G. Kerr*, for the respondents, argued that the grounds on which the application to quash the by-law is made are technical and without merit, and the Court should not look with a microscope at such irregularities as are com-



plained of, when the will of a municipality is to be ascertained. It should follow the rule laid down by Boyd, C., in *Re Stephens and Township of Moore* (1894), 25 O.R. 600, at p. 605, and refrain from interference "unless there has been a manifest and indisputable excess of jurisdiction or an undoubted disregard of personal rights." The Court should consider the confusion that will arise if this by-law is set aside, on the strength of which the parties assessed have paid their taxes in all but a few cases, while the only person objecting is the appellant, who is estopped by his acts and conduct from making his application: *Re Gilchrist and Sullivan* (1879), 44 U.C.R. 588, 592; *Re McKinnon and Caledonia* (1873), 33 U.C.R. 502; *Re Grant and Puslinch* (1868), 27 U.C.R. 154, 157. The discretion of the Court should be exercised to support the by-law. As to the objection based upon the alleged absence of the engineer's report, we say that there was in fact such a report, and that in any event no report is necessary in order to authorise works of the nature here in question. The descriptions objected to are adequate, and if any errors exist they can be rectified in the Court of Revision.

*Lewis*, in reply referred to *Byrne v. Township of North Dorchester* (1902), 2 Clarke & Scully 318, 321, on the question of invalid description. He also referred to Proctor, *op. cit.*, pp. 85, 311.

December 22. GARROW, J.A.:—Appeal by the applicant from an order of the Drainage Referee dismissing an application to quash a by-law of the respondent.

The by-law was finally passed on the 26th day of September, 1910, and was intituled "A By-law for the Repair and Maintenance of the Forbes Drainage Works in the Township of Tilbury East and for Borrowing on the Credit of the Municipality the Sum of \$7,599 for Completing the same."

The by-law, however, as its numerous recitals shew, was not intended to provide for doing any work under it, but solely for the purpose of recouping the respondent in respect of work already done and paid for by it, under the circumstances hereafter appearing.

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The facts involved, which are peculiar and somewhat intricate, are fully set out, with his usual care and precision, in the judgment delivered by the learned Referee.

Seventeen grounds are set out in the applicant's notice of motion before the learned Referee, but those mainly relied on before us are:—

1. That the work for the payment of which the proposed assessment is made was work requiring to be based upon a previous report by an engineer, and there was no such report.
2. An erroneous assessment of all lots in the drainage area for injury liability.
3. The work was done, without authority, before the by-law was passed.
4. Misdescription and improper description of parcels.
5. Misapplication of funds to the benefit of which the drainage area was entitled.
6. Improper inclusion, in the total amount, of arrears and of other items not properly or lawfully chargeable against the drainage area.

Of these it is obvious that the first and third, since they go to the root of the matter, are the most important.

In the beginning, the respondent evidently considered, properly, I think, that the then proposed work was of such a nature as to require the services of an engineer to examine and report. And, accordingly, the council appointed Mr. Baird, an engineer of experience, to take the matter in hand.

He made a report dated the 11th September, 1906, containing a large number of suggested changes and improvements, the whole to cost \$20,988; but, owing to the heavy cost, the report was not adopted; and the matter was, on the 14th January, 1907, referred back to him for reconsideration, with the request that, in view of the cost, he should consider the advisability of abandoning or postponing all works except the repairs and improvement of pumping station No. 2 and its plant.

He made a second report, dated the 5th September, 1907, in which he said that he had reconsidered his former report in the light of the resolution of the council, and therein made certain recommendations of necessary repairs and improvements,

to cost in all \$10,893.29, for which he had, in the usual form, assessed the lands to be benefitted. This report was apparently received and adopted by the council by a by-law provisionally passed on the 2nd October, 1907.

But in the previous month of July the council met at the pumping station, and certain improvements were then suggested, apparently by members of the council and by a Mr Flook, a contractor, who was required by the council to make an estimate of the cost of the suggested improvements; and the clerk was instructed to correspond with Mr. Baird and ascertain whether he would approve of the suggestions.

And, apparently without obtaining any further report from him, the council employed Mr. Flook to prepare specifications and to do the work, which he at once proceeded to do. His specification, which might also be called a tender, was dated the 2nd August, 1907. The work itself was commenced early in August, and was apparently completed before the end of the year; for on the 16th December, 1907, the council passed a resolution directing the clerk to request Mr. Baird to examine the work and see if it was satisfactorily completed. On the 5th January, 1908, Mr. Baird reported, stating: "I have made an examination of the work of repair and improvement lately constructed in the remodelling of No. 2 pumping station of said works, its machinery and plant, and beg to submit in connection therewith the following report." He then, in the report, proceeded to review the work, in general favourably, but otherwise as to some of the details, not necessary now to speak of, which he recommended should receive further attention. But the work which he inspected and in part approved of was not done under any report previously made by him, or by any other engineer, but was work done entirely upon the recommendation of Mr. Flook, for the doing of which there does not appear to have been even a previous by-law of the council.

The appellant does not now complain that the work was not useful work, or even that it was insufficient to meet the then requirements in the way of repair of the system, nor that it was not well done, or not completed. His whole complaint upon these heads is, that, under the circumstances, it had not been

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preceded by a report from the engineer and a by-law authorising the work, as the statute requires. And to that objection I am quite unable to see a satisfactory answer. The procedure from beginning to end is statutory, and the directions of the statute must, of course, be substantially observed. Where proceedings for the original construction of a drain are instituted, they begin by a petition, followed by a report from the engineer. Both are in the nature of conditions precedent, required to found jurisdiction in the council to charge and assess the lands in the drainage area for the expense of the work. If subsequent repairs are required and do not exceed \$800, they may be undertaken without previously obtaining an engineer's report (sec. 76 of the Municipal Drainage Act, 1910); but, if they exceed that sum, they fall within sec. 77, which, while dispensing, with the petition required by sec. 3, expressly requires a report; and only when the council has received and formally adopted such a report may it undertake the work "specified in the report," for the doing of which the engineer is given all the powers to assess, to the same extent and by the same proceedings and subject to the same rights of appeal as are provided in respect of an original work.

The report is intended not merely for the information and benefit of the members of the council, but of the various land-owners in the drainage area whose lands it is proposed to charge. It is a document of very great importance indeed in the scheme of proceedings provided by the statute. It may itself be the subject of an appeal to the Drainage Referee, who may set it aside: see secs. 94 (3), 99; and, if set aside, the whole drainage scheme would certainly fall with it.

The provisions of sec. 89 do not help the respondent. They clearly imply an assessment lawfully made, upon the faith of which money has been advanced out of the general fund. There was no lawful assessment here, no assessment indeed at all, and not even a by-law authorising the work to be done. The whole affair was as irregular as it well could be, and quite incapable of cure by the various flounderings, for they are nothing else, through which the council, in a vain effort to extricate itself, subsequently passed.

Nor am I able to see any proper evidence of estoppel on the part of the appellant, even if estoppel could arise in respect of a statutory condition precedent conferring jurisdiction such as this: see Maxwell on Statutes, 4th ed., p. 578 *et seq.*; *Township of McKillop v. Township of Logan* (1899), 29 S.C.R. 702, at p. 705.

We were referred to a number of cases in which it is said that the Court may exercise a discretion on applications to quash by-laws; and, doubtless, that has been frequently said. We were, however, referred to no case under the drainage legislation of the Province in which the Court declined to give effect to an objection such as the one in question. On the contrary, there are cases in which the Courts have acted where the objection was in substance much less fundamental; as, for instance, where the engineer, although he made a report, had omitted to take the oath as required by the statute: *Township of Colchester North v. Township of Gosfield North* (1900), 27 A.R. 281. The discretion is, of course, a judicial one, to be exercised judicially and not arbitrarily; and I see no reason at all, in the circumstances, why I should interpose my discretion, if I have one, to shield the respondent in its exceedingly irregular and ill-advised proceedings.

That being my conclusion, I do not think it necessary to discuss the other grounds of attack, further than to say that, as at present advised, I would not have set aside the by-law upon them or any of them alone.

The appeal should be, in my opinion, allowed, and the by-law in question quashed, the whole with costs to the appellant.

MOSS, C.J.O., MACLAREN and MAGEE, J.J.A., concurred.

MEREDITH, J.A. (dissenting):—The appellant now stands alone in seeking to compel others to pay for the benefits which he has had; to make the whole of the ratepayers of the municipality pay for the work in question, which was done, exclusively, for those within the drainage area affected by it; and work which was done at the urgent request of him and others to be benefitted likewise by it; in seeking that which is contrary to

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that which every one concerned intended and aimed at in the proceedings in question; and in seeking that which, it is obvious, would be an injustice, if given effect to, to the great body of the ratepayers of the municipality, who have no concern in the matter.

The grounds upon which this result is sought are irregularities in the proceedings under the provisions of the drainage enactments; a lack in some material respect of things needful in the due administration of the provisions of the enactments.

But I cannot consider that one at whose instance, and for whose benefit, the council acted, and who was a prominent adviser of the council, and of the ratepayers interested, throughout the proceedings, and who had a full knowledge of all the steps taken, can be permitted, when the work has been done, and the benefit had, to escape payment because of irregularities such as those complained of.

In short, I think the appellant waived his right, as he might, to the proceedings not taken; and is estopped from seeking the unjust advantages which he is seeking in this action.

Any one may, generally speaking, waive a statutory provision intended for his benefit; that is familiar law. It is a mistake to say that the power of the council originated with, and depended entirely upon, any report: the power rests upon the statute, which, however, in cases where a report is necessary, makes a report a *sine quâ non* to the exercise of that power against the will of those who may be charged with any part of the cost of the work: the report is a provision for the benefit of the ratepayers to be taxed, and one which, I cannot but think, they may waive. Suppose the urgency of the case required immediate action, and the applicant had in writing urged upon the council to proceed without waiting for a report, can it be that he might afterward insist upon such an irregularity to foist upon the ratepayers at large a debt which the ratepayers benefitted by it alone ought to pay? If so, he could, though his urging the council to proceed was for the very purpose of causing an irregularity which eventually would have had such an unwarrantable and unjust effect.

I find nothing whatever to the contrary of this view in any of the text-books: nor is the case of *Township of McKillop v.*

*Township of Logan*, 29 S.C.R. 702, necessarily opposed to it. It is true that the Chief Justice stated that, in his opinion, estoppel was not applicable to such a case as that; but went on to say that acquiescence was not proved. He did not deal with the question of waiver. That case, however, was one very different from this: in it the proceedings were put in force by an individual who had no sort of interest in them such as gave him power to initiate the proceedings; he was not an owner: and it was not a case in which the council had any power to initiate the proceedings, as in this case it was.

There is, of course, no question of public rights involved: the council acts merely as trustees of the individuals concerned in respect of their own private property and interests, and, if any public roads are affected, acts in the same manner only for the municipality.

And in regard to the observations of one of the learned Judges, in the case I have mentioned (29 S.C.R. at p. 706), that it is "the undoubted right of every person upon whom such a statutory debt is sought to be imposed, to insist that the plaintiff should establish by incontrovertible evidence that the provisions prescribed as necessary to the creation of the debt claimed have been complied with in the minutest particulars . . .," I venture to express the hope, and opinion, that, if it were ever a rule of the Courts, to take so narrow a view of the highly remedial enactment in question, the working out of which is committed, not to very exact and exacting judges who may take every proceeding *en délibère*, unlimited as to time, before acting, but to ordinary laymen, generally in rural districts, a broader, and that which seems to me to be a more reasonable, way of dealing with it now prevails, or else soon shall prevail.

Nor am I at all satisfied that the work done was such as required a petition—that it was not *maintenance* such as might be done under the seventy-first section of the present Act—10 Edw. VII. ch. 91 (O.): but, in the view I have taken of the other question, it is not necessary to consider this point.

*Appeal allowed; MEREDITH, J.A., dissenting.*

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## [DIVISIONAL COURT.]

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RE ZUBER AND HOLLINGER.

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*Arbitration and Award—Valuation of Assets of Business—Appointment of Third Arbitrator—Alleged Impropriety—Proceeding with Arbitration notwithstanding—Award Drafted by Solicitor for one Party—Amount Left Blank—Allowance for Goodwill—Motion to Set aside Award—Contradictory Affidavits—Setting aside or Revoking Submission—R.S.O. 1897, ch. 62, secs. 3, 45—Action to Enforce Award—Motion to be Made in Action—Extension of Time for Moving—Perjury.*

Upon an application by Z. to set aside an award of arbitrators (two out of a board of three) fixing a sum to be paid by Z. "for all the interests of H. arising in any manner whatsoever in connection with the assets" of an hotel, of which H. had been lessee, an order was made by a Judge setting aside the award; and H. appealed:—

*Held*, upon the evidence, that there was no impropriety in the appointment of the third arbitrator; and, if there was, Z., the party complaining, was not free from blame; and, at any rate, it was too late to object, after the parties, knowing the circumstances connected with the appointment, had proceeded with the arbitration and taken their chance of a favourable award.

2. That the preparation by the solicitor for H. of a form of award, with the amount left blank, and its use by the arbitrators in making their award, was not misconduct which would justify the setting aside of the award; the only possible award was one in favour of H. for some amount.

Review of the authorities.

3. That the question whether the arbitrators had allowed anything for goodwill should not be tried on affidavits; and the award should not be set aside on the ground that they had done so, when only one arbitrator swore to that effect, and was contradicted by the others.

4. That, on the motion to set aside the award, the Court could not set aside the submission, even if obtained by fraud or mistake. It was doubtful whether Z. would be allowed to revoke his submission under R.S.O. 1897, ch. 62, sec. 3, after award made, even if he established fraud or mistake; but it could not, in any event, be done simply upon affidavits which were squarely contradicted.

5. That the award should be allowed to stand, and H. left to his action to enforce it; and Z. should be allowed, in that action, to move to set the award aside, the time for doing so being enlarged, under R.S.O. 1897, ch. 62, sec. 45.

6. That, if H. undertook either to abandon the award or, within six weeks, to bring an action to enforce it, and not to object in the action to the regularity of a motion by Z. to set it aside, the appeal should be allowed; but, if H. refused to give the undertaking, the appeal should be dismissed.

Remarks by RIDDELL, J., on the contradictory statements in the affidavits, shewing that there was perjury by one set of deponents or the other.

AN appeal by E. Hollinger from an order of TEETZEL, J., of the 27th October, 1911, made upon the application of Joseph Zuber, setting aside an award of arbitrators whereby it was found and determined that Zuber should pay to Hollinger the sum of \$14,000 as a just and proper amount to be paid for all



the interests of Hollinger arising in any manner whatsoever in connection with the assets of the Walper House, an hotel in the town of Berlin, of which Hollinger had been lessee and of which Zuber had obtained a lease.

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December 14 and 15. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., RIDDELL and LATCHFORD, JJ.

*M. A. Secord*, K.C., for Hollinger. The question on this appeal narrows down to this: Did the majority of the arbitrators err in adopting the principle of valuation which they did; and, if so, has the Court jurisdiction to set them right in a proceeding of this kind? I submit that the arbitrators acted within their jurisdiction in adopting the method which they did in arriving at the valuation of the assets. Zuber states that the arbitrators, in arriving at the valuation of \$14,000, took into consideration the supposed goodwill of the business and treated it as an asset. I submit that they did not value the goodwill as an asset, or allow \$8,000 for lease and license, but only took into consideration the fact that the hotel was a licensed one, and that the assets were being sold as part of a going concern, and, under such circumstances, possessed an enhanced value; and I submit that they were within their rights in so valuing: *Colonial Bank of Australasia v. Willan* (1874), L.R. 5 P.C. 417, at p. 443; *In re Long Point Co. v. Anderson* (1891), 18 A.R. 401; *Re Bushell v. Moss* (1886), 11 P.R. 251; *Hodgkinson v. Fernie* (1857), 3 C.B.N.S. 189; *Dinn v. Blake* (1875), L.R. 10 C.P. 388; *In re Whiteley and Roberts' Arbitration*, [1891] 1 Ch. 558; *Flynn v. Robertson* (1869), L.R. 4 C.P. 324, at p. 326; *In re Keighley Maxsted & Co. and Durant & Co.*, [1893] 1 Q.B. 405, at p. 412; *Oldfield v. Price* (1859), 6 C.B.N.S. 539, at p. 549; *Mills v. Master, etc., of Society of Bowyers* (1856), 3 K. & J. 66, at p. 74; *England v. Downs* (1842), 6 Beav. 269; *Christie v. Clarke* (1866), 16 C.P. 544, at p. 549; *In re Leas Hotel Co., Salter v. Leas Hotel Co.*, [1902] 1 Ch. 332; 3 Cyc. 626; *Stewart v. Webster* (1861), 20 U.C.R. 469, at p. 473; *Goodwine v. Miller* (1869), 32 Ind. 419; *Burr v. Gamble* (1854), 4 Gr. 626; *Jennings v. Jennings*, [1898] 1 Ch. 378; *Richardson v. Stormont Todd & Co.*

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*Limited*, [1900] 1 Q.B. 701; *Trego v. Hunt*, [1896] A.C. 7; *In re Cavanagh and Canada Atlantic R.W. Co.* (1907), 14 O.L.R. 523; *Calgary and Edmonton R.W. Co. v. MacKinnon* (1910), 43 S.C.R. 379. I submit that, if the arbitrators considered that the assets were more valuable when sold as part of a going concern, the Court has no jurisdiction to set aside the award: *Brown v. Brown* (1683), 1 Vern. 157. There was no misconduct or fraud on the part of the arbitrators: *In re Enoch and Zaretsky Bock & Co.'s Arbitration*, [1910] 1 K.B. 327; *Doberer v. Megaw* (1903), 34 S.C.R. 125.

*G. H. Watson*, K.C., for Zuber. Zuber asked to have the award set aside on account of misconduct and fraud on the part of the two arbitrators, P. J. Mulqueen and W. Hassard, and of Hollinger, first in the appointment of the third arbitrator, and secondly in Hollinger's solicitor preparing the form of award beforehand, leaving blank only the amount of money. Zuber also contended that the arbitrators exceeded their jurisdiction. These contentions I now again submit. The arbitrators, in making their award, exceeded their jurisdiction in allowing a large sum for the goodwill of the business. They were bound to value only the assets, namely, the household furniture, goods and chattels. There was no goodwill attached to the items of furniture. Hollinger could not transfer any right to continue the business. The goods and chattels were worth only \$6,000; and the \$8,000 additional was an allowance for goodwill, and was wrong. The appellant is confusing mistake with mistake of jurisdiction: *Hutchinson v. Shepperton* (1849), 13 Q.B. 955; *Morgan v. Mather* (1792), 2 Ves. Jr. 15; *In re Hall and Hinds* (1841), 2 M. & G. 847; *In re Dare Valley R.W. Co.* (1868), L.R. 6 Eq. 429; *Duke of Buccleuch v. Metropolitan Board of Works* (1872), L.R. 5 H.L. 418, at pp. 446, 447, and 449; *Price v. Popkin* (1839), 10 A. & E. 139. As to misconduct on the part of the arbitrators, I refer to *Widder v. Buffalo and Lake Huron R.W. Co.* (1868), 27 U.C.R. 425; Encyc. of the Laws of England, vol. 1, p. 478; Russell's Power and Duty of an Arbitrator, 9th ed., p. 169, and pp. 366 and 368; Redman's Law of Awards, 3rd ed., pp. 115 and 116; *Dobson v. Groves* (1844), 6 Q.B. 637. The award should be set aside on

account of the action of Hollinger's solicitor in preparing the form of award beforehand: Russell's Power and Duty of an Arbitrator, 9th ed., pp. 165 and 166, and the cases there cited; *Re Armstrong and Moyes* (1905), 6 O.W.R. 104; *Fetherstone v. Cooper* (1803), 9 Ves. 67; *In re Underwood and Bedford and Cambridge R.W. Co.* (1861), 11 C.B.N.S. 442. I also refer to *In re Enoch and Zaretsky Bock & Co.'s Arbitration*, [1910] 1 K.B. 327.

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*Secord*, in reply. There was no misconduct on the part of the appellant or of the arbitrators, and all the talk about misconduct is mere suspicion: *Hutchinson v. Hayward* (1866), 15 L.T.R. 291; *Anderson v. Wallace* (1835), 3 Cl. & F. 26; 3 Cyc. 628; *Slack v. McEathron* (1847), 3 U.C.R. 184; *Re Grant v. Eastwood* (1875), 22 Gr. 563; *Saulter v. Carruthers* (1861), 20 U.C.R. 560, at p. 562. Any irregularities in the arbitration have been waived; Zuber is in possession of the assets: *Moseley v. Simpson* (1873), L.R. 16 Eq. 226; *Tullis v. Jackson*, [1892] 3 Ch. 441; *Webster v. Haggart* (1884), 9 O.R. 27, at p. 29; 3 Cyc. 718, 720; *Prentiss v. Farnham* (1856), 22 Barb. (N.Y.) 519; *Parrott v. Shellard* (1868), 16 W.R. 928; *Wood v. Reesor* 1895), 22 A.R. 57, at p. 62; *In re Manley and Anderson* (1859), 2 P.R. 354.

December 22. RIDDELL, J.:—This case discloses the most disgusting mass of perjury it has been my ill fortune to meet in thirty years' experience. Solicitor swears against solicitor, client against client, arbitrator against arbitrator. There is direct and categorical contradiction on all material points, and that not in respect of mere matters of opinion or of matters of fact as to which there might be a misunderstanding or which might fail to be observed or which might be forgotten, but in respect of matters of fact in which the deponents took part, of such importance that they could not escape notice or be misunderstood and so recent that they could not be forgotten. This is a state of affairs that is a disgrace to those who are guilty, and it would be a disgrace to the country, either if it were allowed to pass without comment and investigation or if the crime should remain without due punishment.

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Hollinger, in and before April, 1911, occupied the Walper House, Berlin, under a lease expiring on the 8th May. Zuber, on the 10th April, procured a lease from the landlord for one year, beginning at the termination of Hollinger's term. He made an arrangement with Hollinger to take over and pay for his property—I purposely use the indefinite expression. As they were not able to agree as to the price to be paid, it was agreed to leave that to arbitration.

The solicitor for Hollinger, in the presence of the parties, drew up, in pencil, an informal memorandum, which contained a clause that the question whether or not Hollinger should receive anything for goodwill was to be left to the discretion of the arbitrators. Affidavits (Schoenmaker, 9th June; Walter, 9th June; Sims, 9th June; Duering, 9th June; Zuber, 23rd October; Sauter, 23rd October) are filed that it was agreed between the parties that nothing was to be allowed for goodwill, and that the arbitration should be confined to the valuation of Hollinger's interest "in the assets in and about the said hotel premises;" this is categorically denied by Hollinger and his solicitor (Hollinger, 14th October; Secord, 14th October.)

However that fact may be, this memorandum, when produced, has the clause providing for goodwill scored through—a draft agreement signed by the solicitors for both parties is also produced which does not contain this clause.

The solicitor for Hollinger drew up a submission to arbitration, and sent it (on the 1st May) to the solicitor for Zuber, saying in his letter: "I think it follows strictly the lines of the short memorandum approved by us. Any deviation therefrom is for the purpose of working it out, and does not affect the parties." The following day a reply was sent, approving of the agreement, "with the one exception that Mr. Hollinger's business tax should be deducted from the amount to be paid by Mr. Zuber."

The agreement (dated the 27th April) was signed and sealed by both parties—the important clauses are as follows:—

"Whereas differences have arisen between the parties hereto relative to the proper amount to be paid by Joseph Zuber to E. Hollinger in connection with the Walper House assets.

"And whereas it has been agreed between the said parties that such differences shall be referred to arbitration in the manner hereinafter set forth.

"Now this agreement witnesseth that it is hereby agreed by and between the parties hereto that the said disputes and causes of difference, as hereinafter set forth, shall be and they are hereby referred and submitted to the arbitration and determination of three arbitrators, one of whom shall be appointed by each of the parties hereto within one day after the delivery of these presents, and the third arbitrator shall be appointed by the two arbitrators chosen by the parties hereto; and, in the event of their being unable to agree upon such third arbitrator within one hour after their meeting, such third arbitrator shall be appointed by E. J. Beaumont, of Berlin, whose appointment shall be in writing and shall be binding upon the parties hereto.

"The question to be decided by the arbitrators is, what is a just and proper amount to be paid by Joseph Zuber to E. Hollinger for all the interest of E. Hollinger arising in any manner whatsoever in connection with the assets of the Walper House property at present belonging to E. Hollinger.

"The arbitrators shall have full control over all the arbitration proceedings, and the arbitration proceedings shall not be invalid or become inoperative by reason of any act or omission on the part of the arbitrators or any one or more of them, and the award of the arbitrators or a majority of them, when made, shall be valid and binding upon the parties hereto notwithstanding any defect or irregularity in any of the proceedings or in the making of the award.

"And the said Joseph Zuber hereby agrees that he will pay the fees and disbursements of all the arbitrators in connection with the said arbitration.

"It shall not be necessary for the arbitrators to call any evidence whatsoever, unless in their discretion they think it advisable so to do; and the said arbitrators shall have the power to act as valuers and to make the award upon their own valuations."

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The License Commissioners had refused to grant the license for the ensuing year to Hollinger, and had recommended the grant to be made to Zuber; and, as Zuber dealt direct with the landlord, and Hollinger's lease was expiring, he says that all he was getting from Hollinger was the chattels mentioned in a stock list—and these, too, covered by a chattel mortgage.

Hollinger appointed P. J. Mulqueen his arbitrator; Zuber appointed J. Scully; and these were not able to agree upon the third. Accordingly, Mr. Beaumont, who is the Local Registrar at Berlin, appointed a third, William Hassard, who is, like Mulqueen, a licensed victualler residing in Toronto. Mr. Beaumont says that Zuber first spoke to him and suggested that he should appoint A. M.; that then he saw the solicitor for Hollinger and asked him to suggest some names, and the solicitor submitted the names of G. G., of Toronto, hotel-keeper, William Hassard, of Toronto, hotel-keeper, and R. H. G., of the same place, barrister-at-law. Then Beaumont made up his mind that he would appoint an hotel-keeper not living in Berlin, so that he would have special knowledge and not be subject to local influence.

Mulqueen and Scully met on the 3rd May, at Scully's office, and, as I have said, they failed to agree upon a third arbitrator (Scully says Mulqueen did not name any one, and that he, Scully, named one E. S., a dry goods man in Berlin). Both signed a paper stating that they were unable to agree, and "therefore request that Mr. E. J. Beaumont appoint the third as per memo. of agreement set forth." Armed with this, Mulqueen returned to the Walper House and went with Hollinger's solicitor to Mr. Beaumont's office and delivered the paper to Beaumont—and the solicitor suggested that Scully should be sent for before anything was done. Scully came, nothing having been done in the meantime—or said—about appointing the third arbitrator. The name of William Hassard was mentioned. Scully raised no objection, except to say that he did not think there should be two hotel-keepers on the board, and suggested again E. S., the Berlin dry goods merchant. Scully files an affidavit full of "verily believe" and the like, and is or pretends to be suspicious of

everything done by Mulqueen and Beaumont—but I can see no reason for disbelieving Beaumont when he says that in appointing the third arbitrator his sole desire was to appoint some one having knowledge of the matters in question, and who would act impartially.

The arbitration proceeded without objection. Scully swears that he and Mulqueen went over the articles and valued them, agreeing on the valuation in each instance before leaving the article, and made the value \$6,001. Hassard also assisted in fixing the value on some articles. This done, Mulqueen and Hassard contended that a sum should be allowed for goodwill. To this Scully demurred. The two agreed that the award should be \$14,000; Scully was of opinion that it should be \$6,001 only. Mulqueen swears that, when he and Scully went to value the articles, Scully took an inventory and placed certain valuations thereon; that he, Mulqueen, did not concur in these valuations, but regarded them as valuations as though at a forced sale; that Hassard and he (Mulqueen), in arriving at the valuation of \$14,000, took into consideration the fact that the Walper House was a licensed hotel, and that the assets were being transferred to Zuber by Hollinger as a going concern; that Scully is mistaken when he tries to make it appear that Mulqueen and Hassard allowed \$8,000 for lease and license. He swears, further, that he regards the sum of \$14,000 as a fair valuation of the assets of the Walper House as on the 27th April; and that he would have been himself perfectly willing to give the sum of \$14,000 for the assets, if he wanted to purchase an hotel.

Hassard swears also that the prices set by Scully were prices as at a forced sale—that “no specific amount was included . . . for the license, the lease, or for the goodwill . . . ; that, in arriving at the said amount of \$14,000, I took into consideration the fact that the goods and chattels . . . were of a very much greater value than \$6,001 when they were being transferred . . . as a going concern. I took into consideration the fact that the Walper Hotel was a licensed hotel, and that . . . Zuber had received a license for the said hotel premises, and that the goods and chattels were to be used by him in connection with the

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said hotel property . . . ; that I verily believe the sum of \$14,000 is a fair valuation of all the matters referred to the said arbitrators for valuation; and, if I wanted to purchase an hotel business, I would be very glad to give the sum of \$14,000 for the assets belonging at the date of the submission agreement to . . . Hollinger, and which were being transferred by him to . . . Zuber."

The two, Hassard and Mulqueen, made an award for \$14,000 in this form:—

"Whereas, by a certain agreement in writing made between Joseph Zuber and Ed. Hollinger, it was agreed that all matters in difference as set out in the said agreement should be referred to arbitration.

"And whereas Joseph Zuber appointed J. Scully his arbitrator and Ed. Hollinger appointed P. J. Mulqueen his arbitrator and E. J. Beaumont appointed William Hassard third arbitrator.

"Now we, the undersigned, do award and fully determine as follows: that Joseph Zuber shall pay to Ed. Hollinger the sum of fourteen thousand dollars as a just and proper amount to be paid by Joseph Zuber to E. Hollinger for all the interests of E. Hollinger arising in any manner whatsoever in connection with the assets of the Walper House.

"And we do hereby fix the arbitration fees as follows, to be paid by Joseph Zuber according to the agreement—

"To William Hassard the sum of \$20.00.

"To P. J. Mulqueen " " " 20.00.

"To J. Scully " " "

"Signed and published the 4th day of May, A.D. 1911."

Before the arbitration began, the solicitor for Hollinger had prepared a draft form for the award, and had handed it to Mulqueen, telling him that he did so in order that he might know in what form to draw the award; but the amount was left blank, and no suggestion made to Mulqueen as to the amount to fill in or as to the amount of the award.

This, it seems to me, was only common business prudence—there can be no pretence that any harm was done or intended; but it is argued that it vitiates the award. This question will be considered later.



A motion was made to set aside the award, and the motion succeeded; my brother Teetzel setting aside the award with costs, on the 26th October, 1911, upon the sole ground that the arbitrators had allowed something for goodwill.

My learned brother says: "I think it is not denied that it was distinctly agreed, when the agreement was being prepared, that the arbitrators should not take into consideration any question of goodwill." Both Hollinger and his solicitor, in affidavits sworn on the 14th October and filed on the 16th October, do distinctly deny this allegation. But the learned Judge does not proceed upon this ground; he considers that all the facts and circumstances shew that it was not within the scope of the agreement that the arbitrators should be allowed to place a value upon this goodwill, which never did exist—and that they "assumed to place a value upon an asset which had no existence in fact or in law, they went beyond what they were justified in doing; and, therefore, their award . . . cannot be sustained." His Lordship does not deal with the alleged misconduct of the arbitrators and of Hollinger and his solicitor.

The first ground, as to misconduct, is the alleged impropriety in the appointment of Mr. Hassard. What is said about that is, that, when the solicitors were discussing the terms of the agreement, Hollinger's solicitor suggested to Zuber's that G. G. of Toronto, hotel-keeper, would be a proper person to appoint, but Zuber strongly objected; and so it was left to Mr. Beaumont to appoint; that, notwithstanding this, Beaumont had telegraphed G. G., asking him if he would act; G. G. declined, but suggested William Hassard instead; that the solicitors had agreed that "neither of us should in any way interest ourselves in the arbitration or in any of the proceedings," and that Hollinger's solicitor "directly violated" this agreement by suggesting G. G., Hassard, or R. H. G.

Surely this was no worse than Zuber suggesting the Berlin merchant ("The party complaining ought to be free from blame:" *per* Lord Eldon in *Fetherstone v. Cooper*, 9 Ves. 67, at p. 69). And in any case the parties knew all about the circumstances connected with the appointment of Hassard, and went on and took their chance of a favourable award—it is now too late to object.

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The second alleged impropriety (I am not now speaking of the merits of the award itself, but of the concomitants) is, that Hollinger's solicitor prepared a blank award and handed it to Mulqueen.

I confess that this does not seem to me more objectionable than Mulqueen procuring a blank from a law stationer. Of course, all care must be taken not to suggest what the award should be; but, where the only award must be an amount in favour of one named party, I cannot see what possible harm can accrue from the solicitor taking the precaution that the award shall be in legal and proper form.

The cases do not decide that an award shall be set aside simply on this ground.

In *Fetherstone v. Cooper*, 9 Ves. 67, a bill was filed to set aside an award upon the ground, *inter alia*, "2dly, that the award was prepared by the solicitor for the defendant." But Lord Eldon said (p. 68): "The circumstance that the award was prepared by the solicitor for the defendant, though indelicate, is no ground for setting aside the award."

In *In re Underwood and Bedford and Cambridge R.W. Co.*, 11 C.B.N.S. 442, after the evidence, etc., was furnished, the arbitrator consulted the attorney for Underwood in reference to his award, and the attorney prepared the award. Erle, C.J. (p. 444): "I very much disapprove of an arbitrator consulting the attorney of one of the parties . . . as to the form of his award. To say the least of it, it is an extremely imprudent thing. But I am not prepared to say that it is ground for setting aside the award, if the arbitrator had previously made up his mind as to the substance of the award, and merely consulted the attorney upon the framing of it." And at p. 448: "It is, however, a practice which I trust will not be often resorted to."

In *Galloway v. Keyworth* (1854), 15 C.B. 228, it was doubted whether a lay arbitrator had the right to consult an attorney and charge for professional assistance in preparing his award.

In *Behren v. Bremer* (1854), 3 C.L.R. 40, the defendant asked for a formal award, whereupon the arbitrators instructed the plaintiff's attorney to prepare the award (after a conference of a few moments with him alone). He, accordingly, framed

the award in question, which directed the defendant to pay to the plaintiff a certain sum by a certain day, and also a certain other sum, half the expense of the arbitration, "which was increased by £6 on account of the costs of preparing the award." A rule was obtained by the defendant to set aside the award, upon the ground (with another not necessary to mention) "that the attorney for the plaintiff had been improperly concerned in drawing up and preparing the award." Upon the argument (before Jervis, C.J., Maule, J., and Crowder, J.), Maule, J., said (p. 41): "There is no impropriety in arbitrators employing an attorney to prepare their award, and no *necessary* impropriety in their selecting the attorney for one of the parties to prepare it." Upon the argument being made that the expenses of the award were increased, Maule, J., said (p. 42): "Necessarily and reasonably so: the defendant desired a formal award; unless you contend that the sum to be paid for the award was unreasonable." Counsel said, "That is not contended," whereupon Jervis, C.J., said, "Then there is no ground for the rule on that point," referring to *Galloway v. Keyworth*, 2 C.L.R. 860; *S.C.*, 15 C.B. 228.

In our own Courts we have *In re Manley and Anderson*, 2 P.R. 354. There, though the point was not mentioned in the rule as a ground for setting aside the award (p. 355), nor was it urged in argument, Richards, J. (p. 367), says: "I may remark, for the information of the arbitrators, that in England the Judges frequently express their opinion, that it is not desirable to employ the attorney for either of the parties to draw up their award."

In *Re Armstrong and Moyes*, 6 O.W.R. 104, Mr. Justice Teetzel deprived the respondents of costs because their solicitor had prepared the award, but he dismissed the motion to set the award aside upon that ground.

In the present case, the consultation, such as it was, was indeed before the arbitrator had made up his mind; but, as I have said, the award must needs be in favour of Hollinger, and only the amount was to be determined, and all that was furnished was a blank form. I am wholly unable to see any indelicacy or impropriety in the solicitor furnishing such a form; and

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no case has been brought to our notice deciding or indicating that there is—whatever may be the case where the award itself is prepared and not a mere blank furnished.

Then as to the merits, it seems to me that too much has been made of the alleged agreement that nothing should be allowed for goodwill, in view of what the arbitrators who made the award say. Whether any thing could be allowed for goodwill under the general wording, “all the interest of E. Hollinger arising in any manner whatsoever in connection with the assets of the Walper House property at present belonging to E. Hollinger,” we need not consider; and we could not, on the present motion to set aside the award, set aside the submission, even if obtained by fraud or mistake: *Doe d. Lord Carlisle v. Bailiff, etc., of Morpeth* (1811), 3 Taunt. 378; *Sackett v. Owen* (1813), 2 Chit. 39.

That Zuber would be allowed to revoke his submission under R.S.O. 1897, ch. 62, sec. 3, may perhaps be doubtful after award made, even if he established fraud or mistake. But it could not, in any event, be done simply upon affidavits which are squarely contradicted. Even the fact that six persons swear one way to only two the other, is not conclusive—“*ponderantur non numerantur.*”

In my judgment, too, the question whether the arbitrators did allow anything for goodwill should not be tried on affidavits—and the award should not be set aside on the ground that they have done so, when only one arbitrator swears to that effect and is contradicted by the others—I mean without allowing the party in whose favour the award is, an opportunity of shewing that the attack is not well founded. If the award were set aside without more, it might be a great injustice to honest arbitrators and parties.

The award being allowed to stand, the party in whose favour it is made may enforce it by two methods—the award being nothing in itself. These two methods are: (1) under R.S.O. 1897, ch. 62, sec. 13, enforcing it as a judgment by leave of the Court or a Judge; and (2) by action.

The Court or a Judge, on an application made under this Act, would be in no better position than we are in the endeavour

to discover the truth. In a case, like the present, redolent with suspicion, no doubt the practice would be followed usual when the validity of an award is doubtful, and the Court would leave the applicant to his action, unless, indeed, the grounds were not such as could be taken advantage of in an action: *Stalworth v. Inns* (1844), 13 M. & W. 466; *In re Hall and Hinds*, 2 M. & G. 847.

If an action were to be brought, there seems much doubt whether all the objections taken to the award upon this motion could be raised by way of defence: *Smith v. Whitmore* (1864), 2 DeG. J. & S. 297; *Bache v. Billingham*, [1894] 1 Q.B. 107, at p. 112; *Pedler v. Hardy* (1902), 18 Times L.R. 591.

It would seem that the proper course is to move to set the award aside; but there seems to be no good reason why it should not be made on a notice of motion in an action brought to enforce the award: Halsbury, Laws of England, vol. 1, p. 475.

This application is, under our statute (ch. 62, sec. 45), to be "made within six weeks after the publication of the award, but the Court or a Judge may under special circumstances allow the application to be made after the said time."

If, then, Hollinger were to bring his action to enforce the award, Zuber should be at liberty to move in the action to set it aside. Under the special circumstances we (or if there be technical difficulty in the way of the Divisional Court making such an order, one of us sitting as a Judge) could give leave to Zuber to make such a motion (limited as hereinafter mentioned), notwithstanding the lapse of time. Then the whole matter could be fought out on *vivâ voce* evidence given by witnesses in open Court and not upon affidavit. If Hollinger is willing that this course be pursued, he should have an opportunity of so doing; but, if he refuses, it would not, in my judgment, be proper to allow the award to stand.

If, then, the appellant undertakes either to abandon the award or to bring an action to enforce the same within six weeks, and further undertakes in the said action not to object to the regularity of a notice of motion by Zuber to set aside the award made upon grounds set up in the present application (except those referring to the appointment of the third arbitra-

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tor and to the drafting of the award), the appeal will be allowed. Costs here and below to be disposed of by the Judge trying the said action, and, if not so disposed of, to be costs in the said action to the successful party—if no action be brought, the costs to be paid by Hollinger. If an action be brought, neither the judgment of the Court below setting aside the award nor ours allowing the appeal is to be an estoppel—as we express no opinion on the merits.

If Hollinger refuses this undertaking, the case is of such a suspicious character that the award should not be allowed to stand; and the appeal should be dismissed with costs.

Two solicitors swear to directly contradictory stories; one of them must be perjuring himself—they owe it to themselves and their profession to make it clear which it is.

Again, the two clients do the same thing—the one procuring four persons to back up his story; and the one arbitrator is contradicted by the other two. This is a shocking state of affairs, and loudly calls for a thorough investigation. Sometimes local officers are loath to act; the whole mass of affidavits here should be brought at once to the attention of the Attorney-General, who is charged with the supervision of the administration of the criminal law. The fountains of justice are too often polluted with falsehood, and a lesson should be taught offenders that they cannot perjure themselves with impunity even in an affidavit.

FALCONBRIDGE, C.J., and LATCHFORD, J., agreed in the result.

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## RE WEST LORNE SCRUTINY.

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*Municipal Corporations—Local Option By-law—Voting on—Scrutiny—Votes of Tenants—Residence—Finality of Voters' Lists—Voters' Lists Act, 7 Edw. VII. ch. 4, sec. 24(2)—Vote of Person Disentitled by Non-residence—Inquiry as to how Ballot Marked—Municipal Act, 1903, sec. 200.*

*Held*, reversing the judgment of MIDDLETON, J., 23 O.L.R. 598, that, upon a scrutiny, under the Municipal Act, of the votes cast at the voting upon a local option by-law, a County Court Judge has no right to declare void and deduct from the total of votes cast the vote of a tenant whose name was upon the certified voters' list, but who was not in fact a resident of the municipality when the list was certified, and who never afterwards became a resident therein: sec. 24(2) of the Voters' Lists Act, 7 Edw. ch. 4, has reference to a change of residence *after* the list is certified.

Review of the authorities.

*In re Local Option By-law of the Township of Saltfleet* (1908), 16 O.L.R. 293, followed.

*Dictum* of GARROW, J.A., in *Re Ellis and Town of Renfrew* (1911), 23 O.L.R. 427, 435, not followed.

*Semble*, per TEETZEL, J., disagreeing with the opinion of MIDDLETON, J., that the County Court Judge has no power, upon a scrutiny, to inquire how any person who was not entitled to vote, marked his ballot; for that would be contrary to sec. 200 of the Municipal Act, 1903.

*Re Lincoln Election Petition* (1878), 4 A.R. 206, *Haldimand Dominion Election Case* (1888), 1 Ont. Elec. Cas. 529, *Re ex rel. Ivison v. Irwin* (1902), 4 O.L.R. 192, and *Re Orangeville Local Option By-law* (1910), 20 O.L.R. 476, specially referred to.

APPEAL by D. H. Mehring, the applicant for a recount of the votes cast at the voting upon a local option by-law of the Village of West Lorne, from the order of MIDDLETON, J., 23 O.L.R. 598, prohibiting the Judge of the County Court of the County of Elgin from certifying to the municipal council of the village that the by-law had not been approved by three-fifths of the qualified voters voting thereon, until he had made inquiry and ascertained how the ballots marked by John W. Brainard, Ernest Brainard, William Jennings, Eber Shippey, and Alfred L. Parker, and improperly placed in the ballot box, or a sufficient number to enable him to certify, were marked; and directing that the Judge should enter upon the inquiry for the purpose of ascertaining the facts to enable him to certify as a matter of fact, and not as the result of an assumption that the improper ballots must be deducted from those cast in favour of the by-law.

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May 16. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

*C. St. Clair Leitch*, for the appellant.

*W. E. Raney*, K.C., for Dugald McPherson, the applicant for prohibition.

September 8. BRITTON, J.:—On the 2nd January, 1911, the electors of West Lorne voted upon a local option by-law, duly submitted, and the apparent result was: for the by-law, 141; against it, 92. Had this result not been affected, the by-law would have been carried by  $1 \frac{1}{5}$  votes over the required three-fifths: total vote 233;  $\frac{3}{5}$  of 233 =  $139 \frac{4}{5}$ .

One Mehring, an elector of West Lorne, applied for a recount or scrutiny; and on the 31st January, 1911, the recount was had before the Judge of the County Court of the County of Elgin; and, as a result of the mere recount, on inspection, one of the rejected ballots was held good. It was marked for the by-law, thus making 142 for, and 92 against—making a majority over the requisite three-fifths of the total votes, of  $2 \frac{3}{5}$  votes. The learned County Court Judge then proceeded with the scrutiny as to residence of persons whose names were on the voters' list as tenants, and who had assumed to vote, and he found that five persons, whose names are given, had not—for reasons which I will mention later—the right to vote. Deducting 5 from the total vote of 234, leaves 229. Deducting these 5 from the 142 counted for the by-law, leaves 137;  $\frac{3}{5}$  of 229 =  $137 \frac{2}{5}$ ; so the vote for the by-law was  $\frac{2}{5}$  of one vote less than required to carry it. If this result stands, the by-law is lost by  $\frac{2}{5}$  of one vote, and the Judge, unless prohibited, must so certify.

No proceeding, by way of appeal or otherwise, has been taken against the result of the scrutiny, or as to the ruling of the County Court Judge upon the qualification or right to vote of any one of the five disqualified persons; but Dugald McPherson, another elector of West Lorne, accepting entirely the decision of the County Court Judge, as far as His Honour had gone, applied to Mr. Justice Middleton for an order prohibiting the County Court Judge from so certifying until he had first inquired and ascertained how these five persons—not voters—had marked



their so-called ballots. Mr. Justice Middleton made the order, and directed the inquiry to proceed. The decision is reported in 23 O.L.R. 598.

From that order this appeal has been taken by Mr. Mehring, the elector who applied for and obtained the recount and scrutiny. Mr. Mehring got all he applied for ; and he now objects to these five persons, whom he unearthed and whose names were struck off the vote, being called upon to disclose how they marked their ballots. The objection to the order is, that these five men, in marking what are called the ballots, and putting the ballots in the ballot-box, were voters, within the meaning of sec. 200 of the Consolidated Municipal Act, and should not be compelled to state how they voted.

It is an illogical and unfair assumption that all of the five bad votes were in favour of this by-law ; and it is just that, if the law permits it, the fact of how they, or any of them, voted, should be ascertained ; but can a person in the position of a man in fact disqualified from voting, but assuming to vote, and, at the time of depositing the ballot, doing so without objection or question, be required to state how he voted ? With great respect for the opinion of the learned Judge appealed from, I am unable to agree. In my opinion, the man whose name is on the certified list of voters cannot, and on principle ought not, to be compelled to state how he marked the paper placed in his hand as a ballot. It is not necessarily a case of fraudulent voting or fraudulently attempting to vote. It is not necessarily a case of "stuffing" the voters' list. It is the case of a man held to be disqualified under the statute by reason of his non-residence within the municipality after the voters' list was completed and certified and for the requisite time before the voting. Such a person, applying for, and, it must be assumed, honestly applying for, and receiving, a ballot paper to be used, is entitled to the statutory protection as to secrecy. In my opinion, persons on the voters' list as tenants who may not be qualified to vote by reason of their non-residence, and whose votes, if given, must be struck off on scrutiny, are persons called voters, and as such included in sec. 200 of the Municipal Act. It may be of just as much importance to the person who is not a voter in fact, but who innocently marked

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and deposited a paper as a ballot, that he should not disclose how he marked it, as to the real voter; a disqualified person may in perfect good faith assume to vote. The whole system of municipal voting is founded upon secrecy; and to open the door, even a little, would be attended with danger. Even if, in an isolated case, a by-law may be defeated by reason of a disqualified person marking and depositing a paper as a ballot, better that, until prevention is provided for by legislation, than compulsorily violate the secrecy intended. It is not the policy of the law that a person holding a strong opinion and willing to express that at the poll, but not publicly to those of opposing views, should be compelled to do so, if by chance his vote, for good reason, is struck off on scrutiny.

My brother Riddell is of opinion that we must first see if the learned County Court Judge is right as to the whole five struck off on scrutiny being disqualified; for, if wrong as to any one, the by-law will be carried, and there will be no need to go into the question as to how any one actually voted.

For example, if only 4 bad: Total 234—4 bad=230.

For the by-law 142—4 bad=138.

$\frac{3}{5}$  of 230=138.

He then opens up the scrutiny and finds the vote of John W. Brainard good, and so allows the appeal on that ground; and the learned Judge would make an order that the County Court Judge should certify that the by-law was carried by the requisite three-fifths majority.

The authorities establish that, even in a proceeding like the present, where there is no direct appeal from the decision of the County Court Judge on the scrutiny, this Court may consider and may reverse the ruling of the County Court Judge as to any vote.

Assuming that we have the right, and that it is our duty on this application, to review the decision of the County Court Judge, I agree with that learned County Court Judge, that the persons whose votes were struck off were disqualified—for reasons stated by the Judge.

It is hardly questioned that these five disqualified persons come within that part of sub-sec. 2 of sec. 24 of the Voters'

Lists Act, 7 Edw. VII. ch. 4, which reads as follows: "Persons who, subsequently to the list being certified, are not or have not been resident either within the municipality to which the list relates, or within the electoral district for which the election is held." My interpretation of that sub-section, so far as it is quoted, is, that to qualify under the Municipal Act there must be residence within the municipality, and to qualify under the Ontario Election Act there must be residence in the electoral district within that Act.

Section 19 of the Ontario Election Act, 8 Edw. VII. ch. 3, declares who may vote in an Ontario election. In addition to the voter's name being on the list, he shall only "be entitled to vote if he is at the time of tendering his vote a resident of and domiciled in the electoral district and has resided continuously in the electoral district from the time when the list was certified by the Judge of the County Court or when the list under the Manhood Suffrage Registration Act was prepared."

The right to vote under the Municipal Act, 3 Edw. VII. ch. 19, is given by sec. 86, sub-sec. 1:—

"*Firstly.* All persons, whether resident or not, who are in their own right, or whose wives are at the date of the election, freeholders of the municipality;

"*Secondly.* All residents of the municipality, who have resided therein for one month next before the election, and who are, or whose wives are, at the date of the election, tenants in the municipality."

The certified list shall, upon a scrutiny, be final and conclusive, etc., subject to the exceptions named. The residence necessary to give qualification must be a residence subsequent to the list, and must necessarily be a subject of inquiry. The non-residence which disqualifies is expressly by statute provided for; and, with respect for those who are of an opposite opinion, I agree with the County Court Judge.

The persons disqualified were assessed as tenants, on the list as tenants. The list is final and conclusive as to tenancy at the time of certifying the list—the question of subsequent residence must, if questioned at the proper time and place, be determined otherwise than by the list.

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In my opinion, the appeal should be allowed, and the motion for prohibition and for further inquiry as to how the disqualified voters actually marked their ballots, should be dismissed.

In an exceptional matter such as this, both allowance of appeal and dismissal of motion may well be without costs.

RIDDELL, J.:—This is an appeal from the judgment of Mr. Justice Middleton, reported 23 O.L.R. 598—the formal order reading thus:—

“1. This Court doth order and adjudge that C. W. Colter, Esquire, Judge of the County Court of the County of Elgin, be and he is hereby prohibited from certifying to the Municipal Council of the Corporation of the Village of West Lorne that by-law No. 66 of the said village, being a by-law to prohibit the sale by retail of spirituous, fermented, or other manufactured liquors in the said village, has not been approved by three-fifths of the qualified voters voting thereon, until he has made inquiry and has ascertained how the ballots marked by John W. Brainard, Ernest Brainard, William Jennings, Eber Shippey, and Alfred L. Parker, and improperly placed in the ballot box, or a sufficient number of them to enable him to certify, were marked.

“2. And this Court doth further order and adjudge that the said Judge do enter upon the said inquiry for the purpose of ascertaining the said facts to enable him to certify as a matter of fact, and not as the result of an assumption that the improper ballots must be deducted from those cast in favour of the by-law.

“3. And this Court doth further order and adjudge that the costs of the said Dugald McPherson of and incidental to the said application and to this order, be taxed and paid, forthwith after taxation, by the said Dameon H. Mehring.”

We are, in this Court, bound by the decision of a Divisional Court in *In re Local Option By-law of the Township of Saltfleet* (1908), 16 O.L.R. 293, to hold: (1) that the Court can interfere with the County Court Judge when exercising functions of the character here in question; and (2) that the County Court Judge is to enter upon an inquiry as to the right of persons who affected to vote, so to vote. The doubt as to the latter proposition, more

than once judicially expressed, cannot be given effect to by us—it should be removed (if at all) by legislation or a decision of the Court of Appeal.

In order to sustain the order made by Mr. Justice Middleton, we must find that those persons named, having voted, had no right to vote.

The vote was, apparently, for the by-law, 142, against, 92: in all, 234.  $3/5$  of 234 = 140  $2/5$  (141).

If all the votes but one of those directed to be investigated were bad, the result would be (on the assumption that all the bad votes were for the by-law): for, 138; against, 92: in all, 230. Three-fifths of 230 = 138; and the by-law would be sustained. No advantage could be attained, under these circumstances, by an inquiry into the question how each voted.

I am, therefore, of opinion that, in any event, the County Court Judge should not be compelled to investigate the ballots of those named, unless all must be held not to have had the right to vote. And, again, no order should be made for the investigation of the manner in which any one voted or attempted to vote unless it be held that he had no right to vote. I do not decide whether an investigation should be had, even if the vote were clearly bad and so decided to be.

Upon an appeal from the order, then, I think we may, and indeed must, examine into the correctness of the findings as to the right to vote of those whose votes are to be investigated—and, in this view, it makes no difference that the appellant argues that the findings are right, and the respondent that the findings (in one instance) are wrong. It is not the contention of counsel, but the fact and the law, which must govern the decision. There are instances in which the argument of each counsel would, if effective, put his client out of Court, but that is immaterial.

Mr. Raney contends that the decision of the County Court Judge and of my brother Middleton is wrong in the case of J. W. Brainard, E. Brainard, Parker, and Jennings. It is said that there was no change in the place of residence of these between the date of the revised voters' list and the day of polling; and it was argued that the County Court Judge could not enter into any inquiry as to their residence, etc., and that the voters' list is conclusive.

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This contention agrees with my opinion in *Re Ellis and Town of Renfrew* (1910), 21 O.L.R. 74, at p. 83. The decision in that case was affirmed by a Divisional Court, 2 O.W.N. 27, no written reasons having been given. In the Court of Appeal (1911), 23 O.L.R. 427, Mr. Justice Garrow expressed the opinion that it was open for the High Court, upon motion to quash the by-law, to inquire into the residence of a voter under such circumstances, but gave no opinion as to the right of the County Court Judge so to do (p. 435). And he held that those who were not resident at the time of voting do not better their position by the fact that there was no change in their residence after the voters' list was certified. But this is the expression of opinion of the learned Judge alone—and, as the judgment was affirmed, it was *obiter dictum*. The Chief Justice of Ontario and Mr. Justice Maclaren concurred in the result only, without expressing any opinion upon the point now under consideration. Mr. Justice Meredith was for allowing the appeal on account of irregularities; but, while he disagrees with my judgment in another matter, he expresses no disagreement upon this—although it would be impossible to cite him as supporting my view, since he says he is not to be taken as acquiescing in all the views expressed in the High Court. Mr. Justice Magee does not deal with the point.

It will be seen, then, that there is but an expression of opinion by one Judge, and that *obiter dictum*. There was nothing, therefore, to make this conclusive upon Mr. Justice Middleton or upon this Court.

I have considered the matter again, and am not able to recant my former opinion.

The Ontario Voters' Lists Act, 7 Edw. VII. ch. 4, provides, sec. 24, that the list as certified shall "be final and conclusive evidence that all persons named therein, and no others, were qualified to vote at any election at which such list was, or was the proper list to be used;" except, *inter alia*, "(2) Persons who, subsequently to the list being certified, are not or have not been resident either within the municipality to which the list relates, or within the electoral district for which the election is held, and who by reason thereof are, under the provisions of the Ontario Election Act, disentitled to vote."

The exception does not extend to all who "are not or have not been resident;" before the exception can apply, the second part of the condition must also apply—"by reason thereof are, under the provisions of the Ontario Election Act, disentitled to vote."

Now, neither the R.S.O. 1897, ch. 9, nor the substituted Act of 1908, 8 Edw. VII. ch. 3, makes any one disentitled to vote at such an election as this—consequently, these persons do not come within the category referred to in R.S.O. 1897, ch. 7, sec. 24(2).

Even if the R.S.O. 1897, ch. 9, or the new Act, (1908) 8 Edw. VII. ch. 3, could be made to apply, I do not think the matter would be advanced. The words of 7 Edw. VII. ch. 4, sec. 24(2), are "subsequently . . . not . . . resident" and "by reason thereof," i.e., by reason of the subsequent non-residence—this clause does not refer to non-residence at the time of the voters' list, but thereafter. While non-residence at the time of the roll, etc., within the municipality, disentitles one from having his name on the voters' list at all: (1908) 8 Edw. ch. 3, sec. 16(e); it is not this kind of non-residence that sec. 24(2) is aimed at—it is subsequent to the certification by the County Court Judge. Such subsequent non-residence disqualifies only when the residence is without the "electoral district," a county, etc., entitled to return a member to the Assembly: R.S.O. 1897, ch. 9, sec. 8; sec. 2(4); (1908) 8 Edw. VII. ch. 3, sec. 19; sec. 2(g). Any other interpretation, in my humble view, would be legislating and not interpreting statutes.

In John W. Brainard's case, we should, I think, follow the decision in *Re Ellis and Town of Renfrew*, there being no change of residence from the day of the revision of the voters' list until the day of the polling.

I do not think it necessary to express any opinion upon the proper course to follow, if it were held that these four votes were bad.

I am of opinion that the appeal should be allowed, and the order amended by striking out, in the 1st paragraph, all the words after "qualified voters voting thereon;" by striking out the 2nd and 3rd paragraphs; and that there should be no costs here or below.

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If any special order or direction be needed, it may be applied for.

FALCONBRIDGE, C.J.:—I have the misfortune not to be able to agree with either of my learned brothers.

I am of the opinion that the judgment appealed from is right and ought to be affirmed.

I have nothing to add to the reasons given by my brother Middleton.

I would dismiss the appeal with costs.

The Judges composing the Divisional Court having thus disagreed, a reargument was ordered.

October 16. The appeal was reheard by a Divisional Court composed of MULOCK, C.J.Ex.D., TETZEL and CLUTE, JJ.

*C. St. Clair Leitch*, for the appellant, relied on the provision of sec. 200 of the Municipal Act, 1903, that no person who has voted at an election shall, in any legal proceeding to question the election or return, be required to state for whom or how he voted. The five voters in question here were entitled to the protection of that section. He referred to *Re Ellis and Town of Renfrew*, 21 O.L.R. 74, 23 O.L.R. 427; *In re Armour and Township of Onondaga* (1907), 14 O.L.R. 606; *Haldimand Dominion Election Case* (1888), 1 Ont. Elec. Cas. 529, at p. 559; *Re Lincoln Election Petition* (1878), 4 A.R. 206, at p. 210; *Re Orangeville Local Option By-law* (1910), 20 O.L.R. 476; *Rex ex rel. Ivison v. Irwin* (1902), 4 O.L.R. 192. He also contended that evidence could not be given of the contents of a written document, without the production of the document; and the Legislature had prevented the ballots from being reached.

*W. E. Raney*, K.C., for the respondent. The protection of sec. 200 does not extend to the votes in question here. A man who has cast a bad ballot has not voted. Therefore, the cases cited by counsel for the appellant do not apply, because they dealt with people who had a right to vote. However, I rest my case on the other ground, namely, that the voters' list was final and conclusive, and the learned Judge had no jurisdiction



to investigate the right to vote of those appearing in the list. He referred to secs. 369-372 of the Municipal Act; 7 Edw. VII. ch. 4, sec. 24 (O.); *In re Local Option By-law of the Township of Saltfleet*, 16 O.L.R. 293. This case, he contended, was binding here, only so far as one vote was concerned. He referred also to *In re Port Arthur and Rainy River Provincial Election* (1907), 14 O.L.R. 345; *Re Mitchell and Municipal Corporation of Campbellford* (1908), 16 O.L.R. 578; *In re McGrath and Town of Durham* (1908), 17 O.L.R. 514, at pp. 516, 521.

*Leitch*, in reply, referred to *Re Leahy and Village of Lakefield* (1906), 8 O.W.R. 743.

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December 22. TEETZEL, J.:—The two questions for determination on this appeal are:—

1. Whether, upon a scrutiny under the Municipal Act, the County Court Judge may declare void and deduct from the result the vote of a tenant whose name was upon the certified voters' list, but who was not in fact a resident of the municipality when the list was certified and who never afterwards became a resident therein; and

2. Whether, if the County Court Judge, upon such scrutiny, finds that a person whose name was upon the list voted who had no right to vote, such person must disclose before the County Court Judge how he voted.

As to the first question, it is to be observed that until *In re Local Option By-law of the Township of Saltfleet*, 16 O.L.R. 293, it had not been decided that upon such a scrutiny the County Court Judge had any authority to inquire into the qualification of voters whose names appeared upon the voters' lists used at the election; and, though this decision has been adversely commented upon in a number of subsequent cases (*In re McGrath and Town of Durham*, 17 O.L.R. 514, at p. 521, *Re Orangeville Local Option By-law*, 20 O.L.R. 476, at p. 477, and *Re Ellis and Town of Renfrew*, 21 O.L.R. 74, at p. 83), it is until reversed binding upon this Court. That decision, however, limited the inquiry to disqualification which arose after the date of the certification of the voters' list.

In *Re Ellis and Town of Renfrew*, *supra*, Riddell, J., at p. 83, held that, in the case of a person whose name was upon the

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certified list as a tenant, who was not, at the date of the certificate or subsequently, a resident in the municipality, and who voted, the County Court Judge had no authority, upon a scrutiny, to inquire into the right of such person to vote, as the *Saltfleet* case did not apply, because there had been no change of residence subsequent to the certification. On an appeal to a Divisional Court, the judgment in the result was affirmed, but the question now being considered was not passed upon by the Court, in the oral unreported judgment dismissing the appeal, as appears in the following note made at the time by my brother Middleton, a member of the Court: "24th September, 1910. Affirmed on the ground that the *Chesley* case (*Re Schumacher and Town of Chesley* (1910), 21 O.L.R. 522) determines the question as to the illiterate voters; and, this question being determined, all the other matters discussed are immaterial. They do not affect a sufficient number of votes to change the result."

On an appeal from the Divisional Court to the Court of Appeal, the judgment was affirmed: 23 O.L.R. 427. Mr. Justice Garrow in his judgment, p. 435, observes: "Even adopting the finality of the voters' list leaves open the question of the nature and extent of the inquiry which may be made on such a motion as this, in the case of tenants whose names were left upon the voters' list, although actually then disqualified by non-residence and whose disqualification continued down to the time of the election. . . Sub-section 2 of sec. 24 of the Voters' Lists Act speaks of 'persons who, subsequently to the list being certified, are not or have not been resident . . . within the municipality.' This language, if applicable especially in addition to the 'secondly' of sec. 86, seems amply wide enough to include the case of the persons to whom I have referred, as well as those, if any, who, after the list was certified, became disqualified by becoming non-resident. It would be an odd and wholly illogical conclusion that the person who was actually disqualified when the list was certified should be in a better position than one who, properly qualified then, subsequently became disqualified—a result which, in my opinion, could not have been intended, and which is certainly not clearly within the language used."

As it was not necessary in affirming the judgment of the Divisional Court to determine this point, because not sufficient votes

to change the result would be affected by such determination, and because the Divisional Court had expressed no opinion upon it, I agree with the view of my brother Riddell, in his judgment after the argument of this appeal before the Queen's Bench Divisional Court, ante p. 274, that this expression of opinion by Mr. Justice Garrow, who alone expresses it, was *obiter dictum*. The learned Chief Justice and Mr. Justice Maclaren concurred in the result only, and Mr. Justice Magee, in his written judgment, does not deal with this point.

In the judgment appealed from, my brother Middleton adopted the view of Mr. Justice Garrow in *Re Ellis and Town of Renfrew, supra*, and held that the voters' list, while conclusively establishing that the voter was a tenant at the time of the certification, does not determine this question of residence, and that it can make no difference that the evidence upon the question of residence may incidentally disclose the fact that the voter ought not to have been upon the list at all.

In this case it appeared from the findings of the County Court Judge upon the scrutiny that five tenants voted who were not residents of the municipality at the time of the voting; that four of them were not residents when the voters' list was certified, and did not afterwards become residents; and the Judge finds that the five votes were illegal. While there was no determination of this question by the Divisional Court in *Re Ellis and Town of Renfrew*, it is equally clear that in the *Saltfleet* case, *supra*, the Chancellor, in discussing sec. 24 of the Voters' Lists Act, 1907, and the question of disqualification of the voter who became a non-resident after the certification of the voters' list, at p. 302, says: "A subsequent change of residence, which would disqualify, may be investigated under sub-clause (2), but not a subsequent change of status. If the farmers' sons' votes struck off as non-resident, became so non-resident subsequently to the list being certified, that might be dealt with upon proper evidence by the County Judge. The Judge has, therefore, exceeded his jurisdiction in going behind the ballot papers and the voters' list in these particulars, and he should be enjoined." Mabee, J., concurred in this judgment.

This construction was also adopted in *Re Orangeville Local Option By-law, supra*.

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The effect of the decision in the *Saltfleet* case, in thus limiting the inquiry, was not discussed by Mr. Justice Garrow in his dictum in *Re Ellis and Town of Renfrew*; and I learn from my brother Middleton that, upon the argument in this matter before him, counsel for both parties assumed that the Court of Appeal, in *Re Ellis and Town of Renfrew*, overruled on this point the judgment in the *Saltfleet* case.

Although it leads to the incongruous result that, while the vote of tenant A., who may have become a non-resident a month or more before the list was certified and remained a non-resident until after the election, is good, the vote of tenant B., who did not become a non-resident until a day before the election, is bad, and although sec. 86 of the Municipal Act, 1903, requires, *inter alia*, as a qualification of tenant voters, that they must have resided within the municipality "for one month next before the election," the decision in the *Saltfleet* case is, nevertheless, binding upon this Court. Following it, therefore, it must be held that the votes of the four tenants who were non-resident when the list was certified cannot be attacked on the scrutiny.

With these votes held good, the County Court Judge must certify to the municipality that the by-law was carried; and, while it would, therefore, be fruitless for him now to inquire how the ballot of the one illegal voter was marked, as he is directed to do by the judgment appealed from, the question of his right to do so is of sufficient importance for determination by this Court, although the result would not be affected if he found that such voter had marked his ballot against the by-law.

Section 200 of the Municipal Act, 1903, provides that "no person who has voted at an election shall, in any legal proceeding to question the election or return, be required to state for whom he has voted."

In dealing with this section, my brother Middleton took the view that the five ballots in question were marked by persons not entitled to vote, and were, therefore, really not ballots at all, and he thought it was the duty of the County Court Judge to eliminate from the real votes the spurious ballots mingled with the true, by the inadvertent admission to the polling booth of those not entitled to exercise their franchise; and, at p. 601, 23 O.L.R.,

proceeds: "These five men were not voters; they did not vote; they are not within the protection of the Act. As strangers and interlopers, they have placed in the ballot box a paper which interferes with the counting of the true votes, and, so that the result may be ascertained, they are now asked how this was marked, so that the consequences of their attempt to pose as having a qualification they did not possess may be destroyed, and the will of the electorate, as manifested by the genuine votes, may be ascertained. This general provision may also be read as subject to the requirements of sec. 371, which, upon the scrutiny, it seems to me, not only permits but compels the Judge to ascertain how the result was affected by the unauthorised vote."

With the greatest possible respect for the opinion of my learned brother, I am unable to adopt it in this case, because I think it is precluded by authority.

Until the abolition of the numbered ballot in the Ontario Election Act, the Court, upon a scrutiny, could trace the ballot of an illegal voter for the purpose of ascertaining how it was marked. But in *Re Lincoln Election Petition*, 4 A.R. 206, the ballots of alleged illegal voters, with others, had been stolen, so it was impossible to ascertain how they were marked, except by evidence of the persons who had marked them. The learned Chief Justice of Ontario, in delivering the judgment of the Court, at p. 210, says: "Again, by sec. 115 it is expressly stated that no person who has voted at an election shall, in any legal proceeding to question the election or return, be required to state for whom he has voted. Although this does not in express terms extend to the case of the voter voluntarily tendering himself as a witness, it is obvious that even in that case he must be subject to cross-examination. We think that this section should, in furtherance of the objects of the Act, be construed as absolutely exclusive of such testimony." Again, at p. 212, the learned Chief Justice says: "Where it is sought to diminish the majority of the respondent by a vote, two things must be proved: firstly, that the voter had no vote; and secondly, that he assumed to vote for the respondent. In the case put, the second is incapable of proof, and the petitioner therefore fails to prove that the vote was cast for Rykert and not for Neelon."

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In the *Haldimand Dominion Election Case*, 1 Ont. Elec. Cas. 529, which was under the Dominion Election Act, where, as in the present Municipal Act, the ballot was not numbered and could not be traced, Strong, J., at p. 547, says: "Nothing could be made of this charge without admitting the evidence of voters to shew how they voted. This, I hold, cannot be done. To do so would, in my opinion, be a direct violation of the Act which requires secrecy. Section 7 of the Dominion Elections Act enacts: 'No person who has voted at an election shall, in any legal proceeding questioning the election or return, be required to state for whom he voted.' It is no answer to this to say that secrecy is imposed for the benefit of the voter and that he can waive it, for I hold secrecy to be imposed as an absolute rule of public policy, and that it cannot be waived."

Following these decisions, in *Rex ex rel. Ivison v. Irwin*, 4 O.L.R. 192, the late Mr. Justice MacMahon, on an appeal in a *quo warranto* proceeding under the Municipal Act, held that the provision of sec. 200 of the Municipal Act must be construed in furtherance of the object of the Act as absolutely excluding evidence to shew how the ballot was marked.

The last judicial pronouncement on the question is by the learned Chief Justice of the Common Pleas in *Re Orangeville Local Option By-law*, 20 O.L.R. 476, where, at p. 477, he says: "It is clear, I think, that the Judge had no authority to require any person who voted to state for whom he voted. Section 200 of the Consolidated Municipal Act, 1903, which, by sec. 351 is made applicable to voting on by-laws, forbids that being done, and the other provisions as to secrecy of proceedings, secs. 198 and 199, shew how careful the Legislature has been to keep the secrecy of the ballot inviolate."

It is to be observed that the language of sec. 200 is, that "no person" who has voted, etc., not that "no voter," etc.; so that it follows that such person, if his name was on the list, is clearly protected if he actually voted, although he may not have had a legal right to vote.

The appeal must, therefore, be allowed, and the order amended by striking out, in the first paragraph, all the words

after "qualified voters voting thereon," and by striking out the second and third paragraphs; and I think there should be no costs either here or below.

CLUTE, J.:—An appeal from the judgment of Middleton, J., 23 O.L.R. 598. A local option by-law was submitted to the electors of West Lorne on the 2nd January, 1911, with the result that 141 votes, good and bad, were cast for the by-law, and 92 against it. The by-law was apparently carried.

On a recount before the County Court Judge, one rejected ballot was held good, making 142 for and 92 against the by-law.

The learned Judge then proceeded to take evidence and found that five votes were illegally cast at said election, by reason of five tenants having voted who had not resided within the municipality for one month before the election. He then proceeds: "I must deduct 5 from the votes polled in favour of the by-law, 142. This reduces the vote to be counted by me in favour of the by-law to 137. I, therefore, find that the by-law has not been approved by three-fifths of the qualified voters voting thereon, pursuant to sec. 369 of the Municipal Act, 1903."

A motion was then made by McPherson, an elector of the village of West Lorne, for an order prohibiting the learned Judge from certifying to the council that the by-law had not been approved by three-fifths of the qualified voters voting thereon, until he had made inquiry and ascertained how the ballots cast by the five tenants were marked, and for an order directing the learned Judge to enter upon the said inquiry.

The motion was heard by Middleton, J., who made an order prohibiting the learned Judge from certifying that the by-law had not been approved by three-fifths of the qualified voters voting therein, until he made inquiry as to how the five tenants had voted, and directing him to enter upon such inquiry to ascertain the facts. The present appeal is from that order.

The appeal was heard by the King's Bench Division; but, owing to a difference of opinion, as reported ante p. 268, no judgment, it is said, could be entered; and it was suggested by that Court that the appeal should be reargued before another Division.

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The broad ground taken by the appellant in his notice of motion is, that, under the provisions of sec. 200 of the Municipal Act, 1903, no person who has voted at an election shall, in any legal proceeding to question the election or return, be required to state for whom or how he voted.

The respondent, McPherson, also gave notice that, on the hearing of the appeal, he would contend that the order in appeal of Middleton, J., ought to be varied by prohibiting the County Court Judge from entering upon an inquiry as to the right to vote of the five persons (tenants) in the order mentioned, and from making any deductions from the votes cast in favour of the by-law by reason of said persons having voted, and from certifying to the council that the said by-law had not been approved by three-fifths of the qualified voters, on the ground that the voters' list is final and conclusive, and that the learned Judge had no jurisdiction to investigate the right to vote of those appearing in the list.

On the argument, this Court ruled that the whole question was open on this appeal.

The persons entitled to vote on the by-law in question are the "electors" referred to in R.S.O. 1897, ch. 245, sec. 141, and those qualified to vote at a municipal election are defined by sec. 86 of the Municipal Act, 1903, which includes tenants, residents of the municipality who have resided therein for one month next before the election. The voters' list to be used, under sec. 148 of the Municipal Act, is to be taken from the list prepared under the Voters' Lists Act, 1907. Section 24 of the last named Act is in part as follows:—

"24. The certified list shall, upon a scrutiny, under the Ontario Election Act, or the Municipal Act, be final and conclusive evidence that all persons named therein, and no others, were qualified to vote at any election at which such list was, or was the proper list to be used; except . . .

"2. Persons who, subsequently to the list being certified, are not or have not been resident either within the municipality to which the list relates, or within the electoral district for which the election is held, and who by reason thereof are, under the provisions of the Ontario Election Act, disentitled to vote."



The exception above mentioned has reference, in my opinion, to a change of residence after the list is certified. This change did not in fact take place in respect of four of the votes sought to be struck off; and, inasmuch as such persons' names were upon the certified list at the time of the election, they had, in my opinion, a right to vote, although then non-resident. The Act contemplates, I think, a change subsequent to the list being certified; and, no change having taken place, the vote cast by him is good.

For the reasons given by Riddell, J., on the appeal of this case to the Queen's Bench Division, as reported ante p. 274, I do not think I am bound to give effect to the expression of opinion by Garrow, J.A., in *Re Ellis and Town of Renfrew*, 23 O.L.R. at p. 435, whose view was followed by Middleton, J., in the present case. When it is once conceded that the certified list is final, unless a case can be brought within exception 2, it seems to me clear that the Court ought not to go behind the list because during an investigation it incidentally appears that the name of a voter had been improperly left upon the certified list.

The vote then should stand: for the by-law, 142; against, 92: aggregate, 234; deduct 1; leaving 233; three-fifths of which is  $139 \frac{4}{5}$ , sufficient to carry the by-law.

With deference, I think that the appeal should be allowed, and the order of Middleton, J., varied by striking out all the words after "qualified voters voting thereon," in the first paragraph, and by striking out the second and third paragraphs thereof, and there should be no costs here or below to either party.

MULOCK, C.J.:—I agree.

*Appeal allowed.*

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*Vendor and Purchaser—Contract for Sale of Land—Building Restrictions—Covenant—Construction—"Detached House"—Use for "Residential Purposes"—Purposes of "Trade"—Apartment House—Letting in Suites—Nuisance.*

The vendor's title was derived through a conveyance which contained a covenant on the part of the grantees that every residence erected on the land should be a detached house, that the land should be used for residential purposes only, and that no building erected on any part of the land should be used for the purposes of any profession, business, trade, or employment, save and except that of a duly qualified physician or dentist, or for any other purpose whatsoever which might be deemed a nuisance. By the terms of the vendor's contract of sale, the land was to be subject to certain building restrictions, in part as follows: "No attached or semi-detached house shall be permitted, and one detached three-suite dwelling-house, and no more . . . . No such building . . . . shall be used . . . . for the purpose of any profession (save of a duly qualified doctor or dentist), business, trade, or employment, or for any purpose which might be deemed a nuisance, but may be only used for residential purposes." A "detached three-suite dwelling-house" was understood to mean, a detached dwelling-house divided into three suites of apartments, each of which was to be separately let and occupied, with but one front door and a common entrance and staircase leading to the suites:—

*Held*, upon an application by the purchaser under the Vendors and Purchasers Act, that the use of such a house by letting it in suites for separate occupation could not be deemed a nuisance.

2. That, in order to ascertain the scope and effect of the covenant, regard was to be had to the object which it was designed to accomplish; and the language used was to be read in an ordinary or popular, and not in a legal and technical, sense.
3. That the use of the house for the purpose for which it was designed, would be a use for residential purposes, and not for the purpose of a business or trade, within the meaning of the covenant. Letting the suites separately would not be carrying on a trade.
4. That the dwelling-house which the purchaser was to be permitted to erect would constitute one residence only—a detached house—and none the less so because the suites into which it was to be divided were to be separately let and separately occupied.

*Held*, therefore, that neither the erection of the proposed three-suite dwelling-house nor its use for the purposes for which it was designed would constitute a breach of the covenant.

Review of the authorities.

*Rogers v. Hosegood*, [1900] 2 Ch. 388, specially considered and explained.

MOTION by the purchaser, under the Vendors and Purchasers Act, with respect to his objections to and requisitions on the title to land which was the subject of a contract of purchase and sale.

November 20. The motion was heard by MEREDITH, C.J. C.P., in the Weekly Court at Toronto.

*F. J. Dunbar*, for the purchaser.

*R. D. Hume*, for the vendor.

December 23. MEREDITH, C.J.:—The vendor's title is derived through a conveyance from the Hallam estate to the Provident Investment Company Limited, which contains a covenant on the part of the grantees that every residence erected on the land shall be a detached house, that the land shall be used for residential purposes only, and that no building erected on any part of the land shall be used for the purposes of any profession, business, trade, or employment, save and except that of a duly qualified physician or dentist, or for any other purpose whatsoever which might be deemed a nuisance.

By the terms of the contract of sale between the vendor and the purchaser, the land is subject to certain building restrictions, which are to remain in force for twenty-five years from the 1st April, 1910. These restrictions, so far as they are material to the present inquiry, are that:—

“(1) No attached or semi-detached house shall be permitted, and one detached three-suite dwelling-house, and no more, and not more than three storeys in height, with or without suitable coach houses, outhouses, and stabling, . . . may be erected and standing at any one time on any one parcel of land having at least fifty-eight feet of frontage. . . .

“(2) No such building or the land appurtenant thereto shall be used during said period for the purpose of any profession (save of a duly qualified doctor or dentist), business, trade, sport, or employment, or for any purpose which might be deemed a nuisance, but may be only used for residential purposes.”

There is nothing in the material before me to indicate what is meant by “detached three-suite dwelling-house,” but my understanding, as gathered from the statements of counsel, is, that what is intended is a detached dwelling-house divided into three suites of apartments, each of which is to be separately let and occupied, and that there is to be but one front door and a common entrance and staircase leading to the suites.

The purchaser's principal objection is, that the erection of this three-suite dwelling-house would constitute a breach of the covenant in the conveyance to the Provident Investment Company Limited, that every residence shall be a detached house; and it is also objected that such a house would be used for the purpose of a trade or business; and that this use would, therefore,

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constitute a breach of the covenant "that no building erected on . . . the land shall be used for the purposes of any profession, business, trade, . . ." It was also, though but faintly, argued that the use of the house by letting it in suites for separate occupation would or might be a breach of the covenant that no building erected on the land should be used "for any other purpose . . . which might be deemed a nuisance."

In my opinion, this last objection is not well founded. I cannot imagine how the occupation of the three suites as separate residences could possibly in itself be deemed a nuisance; and, if any of the suites was so occupied as to constitute a nuisance, the nuisance would not be caused by anything which the purchaser is permitted to do; and, besides, among the vendor's restrictions is one at least as wide as that to which the covenant extends, as to using the building for any purpose that might be deemed a nuisance. See *Harrison v. Good* (1871), L.R. 11 Eq. 338.

In order to ascertain the scope and effect of the covenants of the Provident Investment Company, regard must be had to the object which they were designed to accomplish: *Ex p. Breull, In re Bowie* (1880), 16 Ch. D. 484; and the language used is to be read in "an ordinary or popular, and not in a legal and technical, sense:" *per* Collins, L.J., *Rogers v. Hosegood*, [1900] 2 Ch. 388, 409.

I have no doubt that the use of the three-suite dwelling-house for the purpose for which it is designed would be a use for residential purposes, and not for the purpose of a business or trade, within the meaning of the covenants.

There are some observations of Farwell, J., in *Rogers v. Hosegood*, [1900] 2 Ch. 388, 394, indicating that, in his opinion, if a large building which is to be used as thirty or forty separate residential flats could be regarded as a private residence, the owner would be carrying on the trade of letting apartments. It may be that he was of that opinion because of the large number of separate flats; but, however that may be, I am, with great respect, of a contrary opinion. It would be rather a surprise to an owner of houses who lets them to tenants to be told that he was carrying on the trade of letting houses; and, if such a person

does not carry on that trade, I do not see how the case is differed where, instead of letting separate houses, he lets separate flats in one house.

I have had more difficulty in reaching a conclusion as to whether or not the erection of a three-suite dwelling-house, where the suites are intended to be separately let and separately occupied, would not constitute a breach of the covenant that every residence erected on the land shall be a detached house; but my conclusion is, that it would not.

The cases draw a distinction between a covenant of this nature, which deals only with the character of the physical structure which is prohibited, and one which deals with the internal arrangement of the structure or the purpose for which it is used; but the line of demarcation between the two classes of covenants is not well defined.

In *Attorney-General v. Mutual Tontine Westminster Chambers Association* (1876), 1 Ex. D. 469, the question was as to the liability of the owner of a house to inhabited house duty; and Sir George Jessel, M.R., said (p. 475): "There are seven blocks of buildings in Victoria street built by the appellants, the Westminster Chambers Association. They differed slightly, no doubt, from ordinary inhabited dwelling-houses, but not materially; because externally they are exactly like seven ordinary dwelling-houses built on to the street with ordinary windows, roofs, &c.; but internally they are divided into separate tenements or suites of apartments in such a way that each has, so to say, its own door, cutting it off from all the other tenements or suites. That is the substantial distinction; each set of apartments is, so far as possible, self-contained, and has all the necessary conveniences to enable people to take it as a place of business. Except for its size, and except for this peculiarity, as to each landing having only one door, or one door in each set of apartments, the block does not differ from an ordinary building. Then how would you describe each one of those seven buildings? There cannot be a doubt that you would call each a house. It was not denied before us, nor does it seem to have been denied in the Court below, that both the ordinary and the legal meaning of the word 'house' would comprise the building in question. Therefore, whether

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we look at the word as in common use in the English language or in legal documents, there is no doubt as to its being a term which would properly describe each of these seven buildings."

In *Yorkshire Insurance Co. v. Clayton* (1881), 8 Q.B.D. 421, 424, the same learned Judge said: "Formerly houses were built so that each house occupied a separate site, but in modern times a practice has grown up of putting separate houses one above the other. They are built in separate flats or storeys, but for all legal and ordinary purposes they are separate houses. Each is separately let and separately occupied, and has no connection with those above or below, except in so far as it may derive support from those below instead of from the ground, as in the case of ordinary houses." In that case the house had one entrance into the street, and the rooms in it opened on a hall, passages, and staircase, common to all the tenants. Some of the rooms on the ground floor were occupied by the landlords as offices, and the remainder, and the rooms on the first floor, were let to tenants who occupied them as offices. The rooms on the second floor were occupied partly by tenants who resided, and the remainder by a care-taker and his wife, who acted as servants to the residents, and cleaned the portion occupied by the lessors as offices or let off; and the question for decision was, whether or not the house was divided into and let in different tenements, within the meaning of sec. 13 of 41 Vict. ch. 15, which provides that where a house being one property is divided into and let in different tenements, and any of such tenements are occupied solely for the purpose of any trade or business or of any profession or calling by which the occupier seeks a livelihood or profit, or are unoccupied, inhabited house duty is to be assessed as if the house comprised only the tenements other than those so occupied or unoccupied; and a house or tenement occupied solely as aforesaid is exempt, although a servant or other person may dwell in such house or tenement for the protection thereof; and it was held that the exemption applied to houses let in separate and distinct tenements each complete in itself, and not to rooms in a house. Brett, L.J., was of opinion that the words "shall be divided into different tenements" meant "where the tenement which is part of the house is so structurally arranged that it may be used or actually occupied, as people in ordinary parlance would say, as a man's own house,

office, shop, or warehouse:" pp. 425, 426. Cotton, L.J., was of opinion that the words of the section were not "satisfied by a house being let in separate holdings without structural division," and that it was sufficient for the decision of the case to say that "here there is no division of the house at all, except that which exists in all houses which have different floors and separate rooms:" p. 427.

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In *Grant v. Langston*, [1900] A.C. 383, the question arose on sub-sec. 2 of sec. 13 of the Customs and Inland Revenue Act, 1878, which provides that "every house or tenement which is occupied solely for the purposes of any trade or business or of any profession or calling by which the occupier seeks a livelihood or profit, shall be exempted from the duties" (i.e., on inhabited houses). The building in question was of two storeys under one roof. The ground-floor was occupied by the appellant to carry on the trade of a licensed retailer of spirits, and was numbered 49, Bath street. The upper storey was occupied by the appellant as his dwelling-house, and was numbered 47, Bath street. Access to the dwelling-house was by a door opening from the public street and by a staircase from that door which led up to the upper storey. Access to the public-house was by a different door, also opening from the street; and there was no internal communication between the dwelling-house upon the upper storey and the public-house on the ground-floor. The question was, whether or not the public-house was exempt from inhabited house duty; and it was held that it was. Lord Brampton, p. 399, said: "The premises the subject of the assessment now in question consist of a building facing Bath street, Portobello, of two storeys in height, one above, and supported by the other, the lower one resting upon the earth. One roof covers the whole building, but each storey is so constructurally composed and arranged for permanent occupation by a separate occupier that there is no internal communication of any kind between the two storeys, nor any common staircase or access to or from the street, or from any part of the outside of the premises, each having a separate entrance or entrances therefrom. In short, it would be impossible to erect two separate houses under one roof, or to divide one building into two distinct and separate houses, more completely than has been accomplished in the building now under consid-

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eration. Indeed, before the appellant opened the lower house or storey as a public-house, it was let to a separate tenant, the appellant occupying only the upper house or storey as he does now. No person resides in the licensed premises. In law I think that each of these storeys constitutes a distinct and separate house, each of which if inhabited as a dwelling should be separately assessed to the duty imposed by the statute, but neither of which could be legally so assessed unless so used. They are not the less two houses because they are both owned and occupied by one and the same person;" and the learned Law Lord cited with approval the statement of Sir George Jessel in *Yorkshire Insurance Co. v. Clayton* which I have quoted. •

In *Kimber v. Admans*, [1900] 1 Ch. 412, the question was as to the meaning of the word "house" in a covenant not to erect more than a certain number of houses, and it was held by Cozens-Hardy, J., and by the Court of Appeal, that a building containing several residential flats constitutes only one house within the meaning of the covenant, there being no context to cut down or alter the popular interpretation of the word "house." Cozens-Hardy, J., referred with approval to what was said by Sir George Jessel, M.R., in *Attorney-General v. Mutual Tontine Westminster Chambers Association*. Lindley, M.R., in the Court of Appeal, said (p. 415): "A property was sold in lots according to a plan for building purposes, and each lot was subject to a covenant that not more than one house should be built upon it. What does that mean? Does it refer to the mode in which the building to be erected is to be subdivided or let, or does it refer to the aggregate of the rooms or whatever the contents of the building may consist of? I think that the latter is the meaning. The house is the whole amalgamation. We know, of course, that a portion of a house may for some purposes, such, for example, as rating and franchise, be a house; but when the word is used in connection with a covenant of this description, I cannot agree that that is the meaning. It applies, not to the interior portions of the building, but to the whole building." Vaughan Williams, L.J., said (p. 416): "I assent to the argument in support of the appeal to this extent: that I think one must, in construing this restrictive covenant, ask oneself what was the object of the covenant, and if I found myself in such a position that I could see no



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object in the covenant if it was simply limited to the bricks and mortar erection, I should have been disposed to put upon the word 'house' a meaning which would cover the user of the house as distinguished from the physical erection. But I do not find myself in that position, and I do not think that any one who is familiar with building estates in London would have any difficulty in ascertaining the object of this covenant, if we construe it as a covenant in which the word 'house' means the physical erection and not the interior arrangement."

In *Rogers v. Hosegood*, [1900] 2 Ch. 388, which was decided by Farwell, J., before *Kimber v. Admans* was heard by Cozens-Hardy, J., but was decided by the Court of Appeal after the latter case was decided by that Court, one of the covenants was, that no more than one messuage or dwelling-house, with such suitable outhouses and stabling (if any) as it might be thought fit to erect in connection therewith, should at any one time be erected or be standing on the Thorney House plot, and that such messuage should be adapted for and used as and for a private residence only, and that no trade or business should at any time be carried on in or upon that plot; and the other covenant was, that the messuage and buildings to be erected upon an adjoining plot should be adapted for and used as and for a private residence, and necessary outbuildings and stables, only, and that no trade or business should at any time be carried on in or upon that plot. The buildings which the defendant proposed to erect on these plots were to contain from thirty to forty flats, eight on each floor; there was to be only one front entrance, divided into two portions for the purposes of support; this entrance was to open into a corridor leading into a lighted hall in the centre of the building. This hall would be open to the sky, but would be surrounded by a colonnade, so as to enable the occupants of flats on the further side to pass into the street dry-shod. The entrance would not admit of carriages passing into the lighting hall. There was also to be a back entrance and a tradesmen's entrance. Each flat was to be self-contained, to have its own front door, opening either on to the central court or on to the corridor leading to it, or, in the case of the first and upper floors, on to corridors communicating by lifts and staircases with the lighting hall; and it was not proposed that any flat should open directly into the

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street. Farwell, J., held that a flat such as proposed was not one messuage or dwelling-house, but several, and said that he could not see any substantial difference for the purposes of the covenant between a terrace of adjoining residences separated from one another vertically and a pile of residences separated from one another horizontally; and he expressed the opinion that a large building which is to be used as thirty or forty separate residential flats does not answer the description of a messuage to be used as and for a private residence. The Court of Appeal, Collins, L.J., delivering the judgment of the Court, held that the proposed building would be a violation of the covenant that "every house to be erected on the two plots, or either of them, or any part thereof, should at all times thereafter be adapted for and used as and for a private residence only." The Court agreed with Farwell, J., that such a building also involved a breach of the covenant that no more than one messuage or dwelling-house should be erected or standing on the plot, and that such messuage should be adapted for and used as and for a private residence; and the Lord Justice added: "Though the building proposed is certainly not one messuage or dwelling-house only adapted for and used as a private residence, neither does it seem to us to constitute several separate dwelling-houses 'adapted for and used as private residences only,' within the meaning of the covenant. We think that residential flats, involving the use of a public entrance and staircase, do not answer the description of private residences contemplated by the words quoted. The covenant must, we think, be construed in an ordinary or popular, and not in a legal and technical, sense; and we do not think that residential flats, though for many purposes separate dwelling-houses, come within the popular description of the class of buildings which it was intended to permit."

It appears to me that the use of the word "private," qualifying the word "residence," was the determining factor in reaching the conclusion to which the Court of Appeal came, and that the view of the Court was, that, as the residential flats involved the use by the occupants of a public entrance and staircase, the building could not be considered a private residence within the meaning of the covenant.

As to the effect of the word "private" qualifying the word "dwelling-house," see *Airdrie Coalbridge and District Water Trustees v. Flanagan* (1906), 43 Sc. L.R. 422; *Bristol Guardians v. Bristol Waterworks Co.* (1911), 28 Times L.R. 33, [1911] W. N. 208.

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The judgment of Farwell, J., in *Rogers v. Hosegood* was cited to Cozens-Hardy, J., in *Kimber v. Admans*, who said ([1900] 1 Ch. at p. 414) that he was asked to follow, as he should always be very glad to do, the judgment of Farwell, J., in the case of *Rogers v. Hosegood*, in the absence of any such context or description as he found in that case. The learned Judge then, after stating the substance of one and the effect of the other of the covenants in that case, proceeded to say: "Now Farwell, J., in considering this question says in his judgment: 'This is a mere question of the construction of a particular document.' He treats the second covenant as meaning really the same as the first, and says that a large building which is to be used as thirty or forty separate residential flats does not answer the description of a messuage to be used as and for a private residence. There is in the present case nothing whatever to limit the user of the building—nothing whatever beyond this covenant that no house shall be erected of less value than £500, and a limit to the number of houses. I have seen the plans. That which it is proposed to erect seems to me to be a house of the value of more than £500, and none the less a house of that value because it is proposed to be used as a series of flats."

*Ilford Park Estates Limited v. Jacobs*, [1903] 2 Ch. 522, appears to be the last reported case bearing on the question under consideration. In that case the stipulations were, *inter alia*, that no trade, business, or manufacture should be carried on upon any lot, and that no house should be erected of less value than £300 . . . and not more than one house should be erected on any lot. The defendant proposed to erect a double-tenement house on each lot, consisting of a ground-floor tenement and a first-floor tenement above it. These tenements were quite distinct and complete in themselves, and had no communication with each other. They were entered by separate front doors set back under a common archway, and the interior staircase leading to the first-floor tenement was cut off by a 4½-inch brick wall from the

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ground-floor tenement. There were separate water closets on the ground-floor in the rear of the building, that belonging to the first-floor tenement being entered by a staircase from the kitchen. There was no way of getting from one tenement to the other except through the front doors. The cost of each building would exceed £300, but the cost of each tenement would be less than that amount. Swinfen, Eady J., held that the erection of the proposed building would constitute a breach of the covenants; and, after describing the mode in which they were to be constructed, said that the language of Lord Brampton in *Grant v. Langston*, which I have already quoted, was exactly appropriate to the property. The learned Judge referred to *Kimber v. Admans*, which was relied on by the defendant, and to *Rogers v. Hosegood*, which was relied on by the plaintiffs, and then proceeded to say: "Now in this case there is no question of one house being built and then used as two houses. In substance each building constitutes two houses which are structurally separate in every respect with separate approaches to the street and no internal communication. It is quite different from a case where one building is erected containing separate flats. In that case there is internal communication between the flats by means of the common staircase. In the present case there is no internal communication whatever. It is merely a case of one house superimposed on another from which it is divided horizontally, while in the ordinary case of semi-detached houses the division is vertical. The question whether with a slight modification of the plan each building can be converted into one block of two flats is not material. I have to consider the buildings shewn on the plan before me, and in my judgment each of them constitutes two houses."

This last case appears to me to be in direct conflict with *Kimber v. Admans*. What the defendant in that case proposed to erect is thus described in the statement of the case in [1900] 1 Ch. 412: "The defendant . . . proposed to erect on these plots four blocks of residential flats, each with a frontage of fifty feet. Each block was to contain two flats on the ground-floor, and two flats on the first-floor. Each flat would consist of two living-rooms and a kitchen, with scullery and offices;" and

nothing whatever<sup>f</sup> is said in this report or in any of the contemporary reports of the case as to there being internal communication between the flats by means of a common staircase.

As I have said, in my opinion, the determining factor in *Rogers v. Hosegood* was the use of the word "private," qualifying the word "residence." There is no such qualifying word in the covenants I have to construe; and the only limitation upon the user to which any building erected on the land may be put is, that the land shall be used for residential purposes, and that no building erected on any part of it shall be used for the purpose of any profession, business, trade, or employment (save and except that of a duly qualified physician or dentist), or for any other purpose whatsoever which might be deemed a nuisance.

It may be proper to say that in Halsbury's Laws of England, Vol. 17, p. 240, note *e*, *Rogers v. Hosegood* is referred to as deciding that a covenant that not more than one house should be erected on a plot is broken by erecting flats, and a covenant not to use a house otherwise than as a dwelling-house is broken by using it for flats, and that no reference is made to the provision that the building should be adapted for and used as and for a private residence only, which, as I have indicated, appears to me to have been the point on which the case turned.

Applying the principle of these cases, as far as I am able to extract any principle from them, I come to the conclusion that the dwelling-house which the purchaser is to be permitted to erect constitutes one residence only, and none the less so because the suites into which it is to be divided are to be separately let and separately occupied; and, for the reasons I have mentioned, I am of opinion that neither the erection of the proposed three-suite dwelling-house nor its use for the purposes for which it is designed would constitute a breach of any of the covenants in the conveyance from the Hallam estate to the Provident Investment Company Limited.

I make no order as to costs.

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March 2. *Damages—Contract to Take and Pay for Shares—Breach—Measure of*  
 Dec. 30. *Damages—Ascertainment of Market Price at Date of Breach—Subsequent Advantageous Sales.*

On the 23rd May, 1907, the defendants agreed to purchase from the plaintiff one million shares of the stock of a mining company, at the price of \$150,000—\$5,000 down and the balance in several instalments payable on different days during a period of about three months. On the 1st June, 1907, the defendants notified the plaintiff that they did not intend to carry out the agreement; and on the 6th June, 1907, the plaintiff brought this action for specific performance or damages for breach of the contract. At the trial, judgment was given in the plaintiff's favour, with the option of taking specific performance or damages, and he elected to take damages:—

*Held*, that the measure of the plaintiff's damages was the excess of the contract price over the market price at the time or times when the breach or breaches occurred; and the fact, if it was a fact, that the plaintiff afterwards recouped himself by making advantageous sales of the shares, did not lessen or alter the liability of the defendants.

*Erie County Natural Gas and Fuel Co. v. Carroll*, [1911] A.C. 105, and *Wertheim v. Chicoutimi Pulp Co.*, [1911] A.C. 301, distinguished.

Judgment of CLUTE, J., affirmed.

*Semble*, also, that the plaintiff had not really been recouped; he could shew the actual value of the stock taken in exchange for the stock in question.

APPEAL by the defendants from the report of an Official Referee to whom a reference was directed to assess the plaintiff's damages for breach of a contract; and motion by the plaintiff for judgment for the amount found by the Referee.

February 27. (The appeal and motion were heard by CLUTE, J., in the Weekly Court at Toronto.

*I. F. Hellmuth*, K.C., for the defendants.

*C. A. Moss*, for the plaintiff.

March 2. CLUTE, J.:—Appeal from the report of Neil McCrimmon, Official Referee, made pursuant to the judgment of Riddell, J., dated the 18th June, 1908. The judgment at the trial declared that the defendants had broken the agreement of the 23rd May, 1907, referred to in the pleadings, and that the plaintiff is entitled to recover such damages as he may have suffered therefrom; and, by consent of parties, it was referred to His Honour Judge McCrimmon, as an Official Referee, to inquire and state what damages, if any, the plaintiff had sustained by reason of the breach by the defendants of the agreement aforesaid, the

plaintiff having elected to take judgment for damages, instead of judgment for specific performance of the agreement in the pleadings mentioned.

By the said agreement of the 23rd May, 1907, signed by the defendants, William J. White and Helen S. White, the defendants contracted to buy of the plaintiff 1,000,000 shares of stock of Cobalt Merger Limited, for the sum of \$150,000, payable as follows: \$5,000 on the execution of the agreement; \$25,000 on the 3rd June, 1907; \$25,000 on the 25th June, 1907; \$50,000 on the 25th July, 1907; and \$45,000 on the 25th August, 1907. The agreement provided for thirty days' extension of the last two instalments, on the terms and conditions therein provided.

The defendants paid the first instalment of \$5,000, but refused to carry out any other provisions of the said agreement.

The Referee assessed the damages sustained by the plaintiff at \$66,106.65, with interest at five per cent. from the 27th August, 1908.

The defendants notified the plaintiff on the 1st June, 1907, that they would not carry out the contract. This action was commenced on the 6th June, 1907. The plaintiff, as found by the Referee, held, at the date of trial, under option, 637,867 shares, and in his own right 362,133 shares.

The plaintiff contended before the Referee that the value of the stock for the purposes of ascertaining damages should be taken at the date of the breach of contract; and the defendants contended that they should have the advantage of transactions which took place in the said stock over two years after the breach of the contract, and after the time for the performance of the contract had lapsed.

The learned Referee came to the conclusion that the damages must be ascertained as of the date at which the contract should have been performed by the defendants.

Assuming that he was right as to this, there was no objection as to the amount of damages assessed. The contention was, however, as before the Referee, that a subsequent transaction by the plaintiff, in which he dealt with the shares in question, should be taken into consideration, and that, the plaintiff having thereby disposed of the shares advantageously, the defendants

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should be credited with the amount which the shares realised; and, if necessary, there should be a reference back to ascertain that amount.

It was strenuously urged by Mr. Hellmuth that the recent judgment of the Privy Council in *Erie County Natural Gas and Fuel Co. v. Carroll*, on appeal from the Court of Appeal for Ontario, delivered on the 14th December, 1910, not yet reported,\* was conclusive in this case. I think it distinguishable, for the reasons stated later in this judgment.

In Halsbury's Laws of England, vol. 10, p. 332, sec. 609, it is said: "In an action for the non-delivery of shares, the measure of damages is the difference between the contract price and the market price at the date of the breach;" citing *Shaw v. Holland* (1846), 15 M. & W. 136; *Powell v. Jessopp* (1856), 18 C.B. 336; and see *Michael v. Hart & Co.*, [1902] 1 K.B. 482 (C.A.)

In the last mentioned case of *Michael v. Hart & Co.*, Collins, M. R., who gave the judgment of the Court, said (p. 490): "The general rule, which is laid down with regard to such cases, is that, where there has been what is called an anticipatory breach of contract going to the whole consideration, it has not of itself the effect of rescinding the contract, for there must be two parties to rescission. It only has the effect of giving the other party to the contract an option to treat the repudiation of the contract as a definitive breach of it, and thereupon to treat the contract as rescinded, except for the purpose of his bringing an action for breach of it. It gives him the right to do that; but, on the other hand, he may refuse to treat the contract as rescinded, and hold the party repudiating the contract to his obligation when the time fixed for performance arrives. That appears to me to be in substance the law on the subject as laid down by Cockburn, C.J., in the case of *Frost v. Knight* (1872), L.R. 7 Ex. 111. In delivering judgment in that case the Chief Justice stated the result of the authorities to be as follows: 'The promisee, if he pleases, may treat the notice of intention'—i.e., intention not to perform the contract—as inoperative and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps

\*Now reported [1911] A.C. 105.



the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss.' "

In *Roper v. Johnson* (1873), L.R. 8 C.P. 167, the action was for breach of contract for the sale of coal for delivery in May, June, July, and August. In May, the defendant wrote desiring the plaintiffs to consider the contract cancelled. The plaintiffs did not assent to this. On the 11th June the defendant definitively refused to deliver any coal, and on the 3rd July the plaintiffs brought an action for this breach. The case was tried on the 13th August; the plaintiffs proved that the price of coal had risen during the whole period since the beginning of May, and was still rising. No evidence was given to shew whether the plaintiffs could have gone into the market and obtained a new contract for coal. Held, that, in the absence of evidence on the part of the defendant that the plaintiffs could have obtained a new contract on such terms as to mitigate their loss, the true measure of damages was the sum of the differences between the contract price and the market price at the several periods for delivery, notwithstanding that the last period had not elapsed when the action was brought, or when the cause was tried.

And so in *Brown v. Muller* (1872), L.R. 7 Ex. 319, where the plaintiff bought iron to be delivered in equal proportions in September, October, and November. In August, 1871, the defendant gave notice to the plaintiff that he did not intend to deliver any iron. In December, the plaintiff commenced an action for non-delivery, and claimed damages. Held, that the proper measure of damages was the sum of the differences between the contract and market prices of one-third of 500 tons on the 30th September, 31st October, and 30th November, respectively.

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Mayne on Damages, 7th ed., p. 195: "Where there has been a contract to deliver fully paid-up shares, the damages will be the market value of the shares at the time at which they ought to have been delivered."

Helliwell on Stock and Stockholders, p. 352, says: "When the failure to perform is on the part of the vendee, the vendor may sell, and hold the vendee for the difference between the amount received and the contract price; or, if he elect not to sell, he may recover from the vendee the difference between the contract price and the market value at the time when the stock was to be delivered and the demand was made."

I do not think the decision in *Erie County Natural Gas and Fuel Co. v. Carroll* is applicable to the present case. That case proceeds upon certain special circumstances differing very widely from the facts in this case. There the plaintiffs (Carroll and another) carried on a business of quarrying stone and burning lime in the county of Welland. They had two kilns. Before 1890, they had used wood and coal as fuel in these kilns. After the discovery of natural gas, they used it as fuel. They had four flowing wells, and in 1891 entered into an agreement with the Erie County Natural Gas and Fuel Company to sell to the company all the gas leases held by them, etc. The agreement contained this clause: "It is understood that the parties of the first part" (Carroll and another) "reserve gas enough to supply the plant now operated or to be operated by them on said property." In 1894, the Erie County Natural Gas and Fuel Company conveyed to the Provincial Natural Gas Company all the wells and franchises so purchased by them. Shortly after the execution of the conveyance, the Provincial company cut off the supply of gas theretofore enjoyed by the plaintiffs (Carroll and another), and refused to permit them to take or to be supplied with any gas from their pipes. The original agreement between the Carrolls and the Erie Company was reformed in 1897, giving the Carrolls the right to the use of the gas as above stated. There were long delays in the matter, but finally there was a reference to the Master, who did not report until the 20th April, 1907. Meanwhile the plaintiffs, in order to obtain gas sufficient to operate their plant, took gas leases, drilled wells, laid pipes, and thus procured from independent sources gas sufficient for their purposes. They did

not require the gas nor did they use it for any purpose other than to supply their plant. In procuring this gas they were put to an expenditure of \$58,000. The plaintiffs subsequently sold their wells for a very much larger sum than they had expended. In giving judgment, Lord Atkinson, after stating the facts, proceeds: "It is plain, on the face of these documents, that the parties to them contemplated that more gas should be obtained from the properties leased than would be sufficient to operate the plant of the plaintiffs, and the reservation contained in the agreement and subsequently embodied in the conveyance merely amounts, in their Lordships' opinion, to a contract on the part of the Erie County Natural Gas and Fuel Company to supply the plaintiffs, out of this larger volume of gas, with sufficient to operate their plant. . . . But the amount of gas to be supplied was not specifically fixed. . . . No portion of the gas had ever been specifically set apart for or appropriated to the plaintiffs' use, or had ever become their property. . . . They were merely in the position of a person who had, for instance, purchased from the owner of a large quantity of grain in bulk a portion of it, while the portion purchased remained part of the bulk and before it had been in any way set apart or identified. The defendants have admittedly broken their contract. They are liable for damages for that breach. . . . It would have been competent for the plaintiffs to have abstained from procuring gas in substitution for that which the defendants should have supplied to them, and have sued the defendants for damages for breach of their contract. They did not take that course. They chose to perform on behalf of the defendants, in a reasonable way, that contract for them and to obtain from an independent source a sufficient quantity of gas, similar as near as might be in character and quality to that which they were entitled to receive. In such cases it is well established that the measure of damages is the cost of procuring the substituted article, not at all the price at which the substituted article when procured could have been sold by the person who has procured it. In *Hamlin v. Great Northern R. W. Co.* (1856), 26 L. J. Ex. at pp. 20, 23, Alderson, B., thus lays down the law applicable to these cases: 'The principle is that if the party does not perform his contract the other may do so for him, as near as may be, and charge him for the

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expenses incurred in so doing.' In *Le Blanche v. London and North Western R. W. Co.* (1876), 1 C.P.D. 286, at p. 302, Lord Esher (then Brett, L.J.) thus expresses himself: 'We think it may properly be said that if the party bound to perform a contract does not perform it the other party may do so for him, as reasonably near as may be, and charge him for the reasonable expense incurred in so doing.' . . . . Where the contract is one for the sale of goods one of the modes in which a party to it may, on the default of the party bound to perform it, perform it for him, is by going into the market and buying goods of a description and quality similar to those contracted for; but if he purchases at a sum equal to or less than the contract price, he can only recover nominal damages, because, the cost for procuring the substituted article not being greater than the contract price, he has got goods equal to those contracted for and at the same or a less cost, and has, therefore, suffered no loss."

It thus appears to me that the facts in the *Carroll* case are quite distinguishable from the present case, and that the principle applied and the decision of that case has no application whatever to the present. The judgment there proceeds, as I understand it, upon the application of the law to the case where a party procures an article similar to that for which he bargained to take its place, and in such case he is entitled only to the cost of so procuring it, and not to profits. In the present case, there was a breach of contract for the payment for certain stock at a certain price on certain days. The vendee repudiated the contract after making the first payment. The measure of damages in such a case is the difference between the purchase-price and the price of the article on the day of the breach, or, as in this case, where the breaches were upon different days, the sum of the differences of the price on the various days when the payments were to have been made, as pointed out in the authorities above quoted.

I think the learned Referee applied the right principle to the assessment of the damages; and, applying that principle, it was not complained before me that the amount so assessed was too large.

The defendants' appeal is dismissed with costs.

With reference to the other motion, the plaintiff is entitled to

judgment for the amount found by the Referee, with costs of the reference and of this appeal and the motion for judgment.

The defendants appealed to the Court of Appeal from the judgment of CLUTE, J.

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October 6. The appeal was heard by MOSS, C. J. O., GARROW, MACLAREN, MEREDITH, AND MAGEE, J.J.A.

*I. F. Hellmuth*, K.C., for the defendants, argued that damages can be awarded only as an indemnity to the party who has suffered damage; and as, in this case, the plaintiff had not only suffered no damage, but had made a profit by his election to keep the shares, instead of insisting on specific performance of his contract, there was no foundation for the judgment appealed against: *Erie County Natural Gas and Fuel Co. v. Carroll*, [1911] A.C. 105; *Wertheim v. Chicoutimi Pulp Co.*, [1911] A.C. 301, *per* Lord Atkinson, at pp. 307, 308. There is no authority which allows one party to make a profit out of the default of another; and, if in this case the damages allowed by the learned Referee are added to the price obtained by the plaintiff for his stock, he will have secured a profit of over \$93,000 by reason of the defendants' default, which is, as suggested by Lord Atkinson's judgment in the *Carroll* case "a somewhat grotesque result." *Roth and Co. v. Taysen Townsend and Co.* (1895), 73 L. T. R. 628, was also referred to.

*C. A. Moss*, for the plaintiff, argued that the recent cases before the Privy Council, cited on behalf of the defendants, had not altered the law on the subject, as laid down in the judgment below, nor had they overruled the principles and authorities upon which the judgment was based, but had simply stated that the question was one of indemnity, which is not denied. The law remains as stated by Lord Halsbury, in vol. 10 of the *Laws of England*, p. 335, upon which, and upon the authorities cited there, and in the judgment of Clute, J., the plaintiff relies. Reference may also be had to *Joyner v. Weeks*, [1891] 2 Q.B. 31, in which case, also, a result which some persons might consider "grotesque" was arrived at; we are not here to defend the law, but to ask for its application.

*Hellmuth*, in reply.

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December 30. GARROW, J.A.:—Appeal by the defendants from the judgment of Clute, J., dismissing an appeal from the report of a Referee and granting judgment for the amount found by the Referee to be due to the plaintiff.

The case was once before in this Court on an appeal by the defendants from the judgment at the trial of Riddell, J. The reference which he directed has since been had, and, as a result, a judgment awarded against the defendants for \$66,106.65 and interest.

As is conceded, the only question of importance upon this appeal is, did the learned Referee, and Clute, J., in affirming him, apply the true measure of damages in ascertaining the amount which the plaintiff is entitled to be paid by the defendants.

The defendants agreed to purchase from the plaintiff one million shares of the stock of a mining company called Cobalt Merger Limited, at the price of \$150,000, payable: \$5,000 down; \$25,000 on the 3rd June, 1907; \$25,000 on the 25th June, 1907; \$50,000 on the 25th July, 1907; and \$45,000 on the 25th August, 1907. The \$5,000 payment was duly made.

On the 1st June, 1907, the plaintiff was notified by the defendants that they did not intend to carry out the contract. And this action was commenced on the 6th June, 1907, in which the plaintiff asked for specific performance, or, in the alternative, for damages. At the trial he was put to his election, and elected to take damages, whereupon the reference was directed. The judgment is dated the 18th June, 1908.

The learned Referee found the plaintiff to be entitled, (1) in respect of certain items not disputed, to..... \$3,000.00  
 (2) 637,867 shares at 5 cents..... 31,893.35  
 (3) 362,133 shares at 10 cents..... 36,213.30

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\$71,106.65

Less down payment of..... 5,000.00

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Total..... \$66,106.65,  
 and interest on this sum at 5 per cent. from the 27th August, 1908.

It appears that at the date of the contract the plaintiff held 362,132 shares in his own right, and had an option from people

called McCormack & Bascom, who were interested with him in the company, upon 637,867 shares, making together the one million shares which he contracted to sell to the defendant. The price fixed in the option was 10 cents per share, and it expired on the 1st July, 1907, but was extended, upon very special terms, in consideration of \$2,000, which the plaintiff paid in order to be prepared to deliver the stock, if demanded as the result of his action, in which, as before-mentioned, he had asked for specific performance.

The defendants' appeals from the judgment delayed proceedings in the reference until October, 1910. In the meantime, namely, in the month of September, 1909, the plaintiff and those interested with him, after many and complicated negotiations, disposed of their belongings in Cobalt Merger stock by trading it for stock in another mining company called "The Right of Way" and a small sum (\$5,500) in cash, out of which had to come certain disbursements, into the details of which it is not necessary to enter. This again was in part used in trade for real estate in the cities of Ottawa and Montreal, some if not all of it subject to mortgages, and in part is still retained by the plaintiff. And the defendants' contention is, that they are entitled to the benefit of these transactions, subject to the judgment, by which, as they further contend, the plaintiff has been fully recouped.

And in support of this rather singular proposition the defendants' counsel cites the recent cases before the Privy Council, of *Wertheim v. Chicoutimi Pulp Co.*, [1911] A.C. 301, and *Erie County Natural Gas and Fuel Co. v. Carroll*, [1911] A.C. 105.

I have looked at these cases with care; and I am quite unable to see that they assist the defendants' contention. Neither of them lays down or professes to lay down any new rule for the assessment of damages. In the first-mentioned case, the rule acted upon was the familiar one that, in giving damages for the breach of a contract, the party complaining shall be placed, as far as money can do so, in the same position as he would have been in if the contract had been performed. And in the second, that, if the party bound to perform a contract does not perform it, the other party may do so for him, as reasonably near as may be, and charge him for the reasonable expense incurred in so doing.

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The difficulty does not lie in any obscurity concerning the law, but in the application of the law to the facts in each particular case. And the real difficulty here seems to me to be in the assertion that the plaintiff has been actually recouped at all. Mining stocks are, as appears by the evidence, a somewhat unstable commodity. So is city real estate covered by mortgages. At the time of the breach, the Cobalt Merger shares had no actual market value, and were, as the evidence shews, unsaleable in such a large block at practically any price. There was, therefore, no means then at hand whereby the plaintiff, acting reasonably, could have performed the defendants' contract by a then sale of the shares. And this condition of things continued for a very long period; and, indeed, but for the exertions of the plaintiff and his associates, involving the expenditure of much time and money in making new arrangements, including the assumption of new obligations, would have, so far as appears, still continued. Why should the defendants, having assumed none of the risks, get all the benefit of these protracted, and still, so far as actual realisation in money is concerned, incomplete, negotiations? Nothing in the cases to which I have referred, nor in any of the others which I have looked into, would give them such a right. If they had performed their contract, the plaintiff would have had \$145,000, in addition to the down payment of \$5,000 in cash, by the middle of 1907. And, so far as I can gather from all the evidence, it is very doubtful if he will in the end, as the fruit of all his subsequent exertions and negotiations, even with the amount of damages as assessed by the learned Referee, be made as well-off in money as if the contract had been duly performed at the proper time.

Under these circumstances, I have no hesitation in agreeing with the conclusions arrived at by Clute, J., in affirming the report of the learned Referee.

The appeal should be dismissed with costs.

MEREDITH, J.A.:—If the property in the stock passed to the defendants under the contract in question, the plaintiff's cause of action could, I suppose, have been only for the price—if the contract were not duly rescinded; whilst, if the property did not pass, though not rescinded, damages only could, I suppose, have been recovered; and so it is difficult for me quite to understand



the judgment said to have been directed, at the trial, to be entered up, or the plaintiff's mode of proceeding in the action. The defendants' refusal to carry out the contract gave the plaintiff a right to rescind it then, and to sue for damages; but that position he does not seem to have taken, having brought this action for "specific performance," or for damages: specific performance by them could have meant only payment of the price by them; at the trial the plaintiff appears to have been given his choice of "specific performance" or damages, and then, but not till then, or afterwards, elected the latter.

But neither party can now go behind the judgment; and so the one question is: What damages should the plaintiff have for breach of the contract to buy the stock in question? And it has long been the settled rule that the measure of such damages is the excess of the contract price over the market price at the time when the goods were to have been delivered. Wise or unwise, logical or illogical, just or unjust, this measure of damages is quite firmly fixed, and must be followed: though one may, perhaps, be pardoned for making a wry face in swallowing it in a case in which the breach, instead of injuring him who seeks damages, may, in truth, have brought him a fortune; and though the essence of damages in actions on contracts is compensation, not punishment; and though the general rule unquestionably is, that the measure of a man's damages is the measure of his loss caused by the breach; so that one might reasonably look for exceptions to the rule governing this case; but I can find none: see *Bridgford v. Crocker* (1875), 60 N.Y. 627. The notion underlying the rule may be that, after rescission, the goods become, or remain, the property of the seller for better or for worse; and yet it is difficult to see why the measure of damages might not be the actual loss, not an imaginary one governed by a hard and fast rule as to time. The law generally tempers the wind to the shorn lamb in requiring him who is entitled to damages to act reasonably with a view to mitigating them; and so it seems extraordinary to me that it should also say, to him who has lost a fortune by his breach of the agreement, pay damages to him who has made that fortune through that breach, and pay it as compensation for the loss which the fortune-gainer has sustained.

The case of *Erie County Natural Gas and Fuel Co.*

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v. *Carroll* was not one coming within the rule which, I think, governs this case; it was one of a continuing breach, in which the buyers took means to relieve themselves from loss so effectually that they sustained none; a case of the injured party reducing the damages until there were none. In the *Chicoutimi Pulp Co.* case there was no rescission; the goods were delivered, but late.

I would dismiss the appeal; which should also, I think, fall by reason of the other answer to it. There is no reason why the plaintiff might not shew the actual value of the stock taken in exchange for that in question, in the ultimate sale.

MOSS, C.J.O., MACLAREN AND MAGEE, JJ.A., concurred.

*Appeal dismissed with costs.*

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[IN THE COURT OF APPEAL.]

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SHEAHEN v. TORONTO R.W. Co.

*Damages—Personal Injury by Negligence—Assessment by Judge—New Evidence on Appeal—Reduction of Damages—Principle of Assessment.*

The plaintiff's damages for personal injury by the negligence of the defendants having been assessed by a Judge at \$10,000, the Court of Appeal reduced the amount to \$7,000, evidence having been received by the Court to shew that a large sum paid to the plaintiff, and said by her to be part of her earnings, was in fact paid upon another account.

*Per MEREDITH, J.A.*:—In estimating damages recoverable for personal injury by negligence, the jury must not attempt to award the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case and give what they consider, in all the circumstances, a fair compensation; and the same rule applies to a Judge.

APPEAL by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., who tried the action without a jury, in favour of the plaintiff, in an action for personal injuries alleged to have been caused to the plaintiff by negligence in the operation of a street car of the defendants upon which she was a passenger.

The only question upon the appeal was as to the amount of the damages, which were assessed by FALCONBRIDGE, C.J., at \$10,000. An earlier assessment, at which the defendants were not represented, was had before LATCHFORD, J., who fixed the amount at \$15,000; but that assessment was set aside and a new trial granted by a Divisional Court: 2 O.W.N. 1263.

Upon the present appeal, further evidence was, by leave of the Court, adduced on behalf of the defendants, as referred to in the argument and judgments. .

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December 4, 5, and 6. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

*D. L. McCarthy*, K.C., for the defendants, argued that the amount of damages awarded by the trial Judge was excessive. He doubted the plaintiff's evidence in regard to her earnings, and said that the Court should insist upon more precise evidence being given in reference to alleged payments of commission. He especially questioned the testimony given on behalf of the plaintiff touching a cheque for \$1,355.27, which the plaintiff asserted had been given to her in payment of commission on various matters, but which the defendants alleged was in fact a payment to the Bartram Company of Dundas from the president of the company which employed the plaintiff, in respect of a transaction had between them. (Evidence was given before the Court as to this). No damages should be allowed for permanent disability, as the plaintiff was not permanently injured.

*M. K. Cowan*, K.C., and *T. P. Galt*, K.C., for the plaintiff, contended that the plaintiff's evidence throughout, and that given on her behalf, was absolutely accurate. She was a young woman of phenomenal ability and capacity for work, and so quite capable of earning a large income: *Bateman v. County of Middlesex* (1911), 24 O.L.R. 84, 25 O.L.R. 137. The amount awarded by the trial Judge was less than the evidence warranted. The plaintiff would never make a complete recovery.

*McCarthy*, in reply.

December 30. GARROW, J.A.:—Appeal by the defendants from the judgment at the trial of Falconbridge, C.J.

The action was brought to recover damages for personal injuries said to have been caused to the plaintiff by negligence in the operation of a street car of the defendants upon which she was a passenger.

The only question is as to the amount of the damages, which were assessed by Falconbridge, C.J., at \$10,000. An earlier

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assessment, at which the defendants were not represented, was had before Latchford, J., who fixed the amount at \$15,000. But that assessment was set aside, and a new trial granted.

In addition to the evidence which was before Falconbridge, C.J., further evidence was given before us touching a cheque for \$1,355.27, which, at the trial, the plaintiff claimed was paid to her as part of her earnings, but which, by the new evidence, was clearly paid upon a wholly different account—a circumstance well calculated, in the case of a witness so well-informed and so little likely to be mistaken as the plaintiff is shewn to be, to suggest that there may have been other exaggerations, not discovered, in the account which she gave of her earnings, outside of her regular salary.

But the undoubted fact remains that the plaintiff's injuries were of a very serious nature; and that her damages should, upon the evidence, be quite substantial. She was evidently an unusually clever, capable young woman, in receipt of a fair income from her own exertions, which has been and will for some time be interfered with as the consequence of her accident. In addition, the nature of the injuries required a very large expenditure for nursing and medical attendance, amounting, it is said, to over \$2,000. We were unfortunately not favoured with the reasons upon which Falconbridge, C.J., proceeded; but it may be assumed that, in the absence of the new evidence, he accepted the plaintiff's evidence as to the \$1,355.27 cheque. That having now been explained, and the whole matter carefully considered, I have reached the conclusion that a fair sum to award the plaintiff would be the sum of \$7,000, to which sum the present judgment should, I think, be reduced, and the appeal to that extent allowed.

Under the circumstances, there should be no costs of the appeal.

MEREDITH, J. A.:—This is not an application for a new trial upon the ground that the damages assessed are excessive or that they are inadequate; the damages were not assessed by a jury, but by a trial Judge; and so may be increased or reduced here without a new trial or new assessment; and, in another

very material matter, the case is not the ordinary one of a motion to reduce or to increase the damages, because additional evidence, of a very material character, has been adduced upon the subject in this Court; evidence which, if it had been adduced before the trial Judge, might have very materially affected his conclusions upon the subject; so that one is really obliged to make a new assessment of the damages in the light of the new evidence; and, in view of the way in which this appeal was argued, it seems to me needful again to state the now well-settled principle on which damages are to be assessed in such a case as this. The plaintiff's injuries arose out of an unfortunate accident—none the less unfortunate because caused by the negligence of the defendants' servants—in which the defendants and others, as well as the plaintiff, sustained very considerable loss; so that it is nothing like a case in which exemplary damages could, properly, be awarded; but is one in which the rule that, in estimating damages recoverable for personal injury by negligence, the jury must not attempt to award the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case and give what they consider, under all the circumstances, a fair compensation, very plainly applies: and, it need hardly be added, the same rule applies to Judges as well as to juries.

The plaintiff's injuries were not such as would ordinarily be considered very grave, though painful and bad enough: she received two hard blows upon the head, had three ribs broken, and an injury to one leg, such as is commonly called rider's sprain; injuries from which, at her time of life, it might well be expected that she would in the usual course fully recover; and one main question of fact is, whether she really has, or has not, recovered; and it is a question obviously of great difficulty, as it cannot be determined by objective symptoms, but must rest so much upon the plaintiff's own word, which may be unconsciously, as well as consciously, exaggerated or untrue.

The great preponderance of the testimony of the medical witnesses is, that, in their opinions, the plaintiff has very far from quite recovered from the effects of the accident; that she has developed an obstinate traumatic hysteria, the outcome of

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which is doubtful; but one of these witnesses testified, with apparently much confidence, that she has quite recovered, that indeed she did not receive any serious injury, but is, and has been throughout, shamming—to use his own mode of expression—is a faker from the beginning, a faker pure and simple; and it is in view of these things that the new evidence is of so much importance. It is obviously very unfortunate that this evidence was not adduced at the trial, and all of the medical witnesses asked whether, if it were true that the plaintiff had concocted and sworn to an untrue state of facts such as is now alleged in order greatly to increase her damages, they would be inclined to hold to their expressed opinions as to her condition, or to accept the opinion of the medical witness who described her as a “faker;” and, if I had my way, I would yet have all these witnesses recalled with that object in view, before giving her the full benefit of their testimony as it now stands. It must not be forgotten that their opinions were based almost entirely, if not quite so, upon subjective symptoms only, as to the plaintiff’s present condition; and, therefore, so very much depends upon her truthfulness.

In order to make that which I mean quite plain, to shew how much depends upon the truthfulness of the plaintiff, let me read from the testimony of one of the medical witnesses, given in the plaintiff’s behalf on his examination in chief at the trial, the witness being an eminent surgeon, whose testimony is invariably given in such a manner as to carry great weight:—

“Q. Did you see the effects of the blow at all? A. No, I did not, but she described them to me—the location of the pain and so on.

“Q. You heard her description of the arm? A. Yes.

“Q. In which she said she can move it from the elbow by keeping it close or if rested upon something to move her body away from it and move her body back to it, but not the arm where it is. What is that? A. Hysteria.

“Q. That, you think, is hysteria? A. No doubt about it in my mind.

“Q. You have heard Dr. Powell’s evidence? A. Yes.

“Q. He has an idea that it is organic injury as well? A. I found no evidence of organic injury.

"Q. None but the pain it caused her? A. Yes.

"Q. Have you any doubt in your mind as to the fact of it causing her pain? A. Not at all; she told me so.

"Q. You would have to rely entirely on what she said? A. Oh, entirely.

"Q. Then we will come to the leg. She had some ribs broken, but those, I think, healed up? A. I think so. I doubt if I could find any track of that.

"Q. Now we will come to the injury to the limb. What do you think? A. I think she had a very violent extension and adduction of the thigh straining the psoas and adductor muscles.

"Q. What then did you find that night when you examined? A. Except for the hysterical contraction, that had recovered.

"Q. But you still find the contraction? A. Yes.

"Q. And that was genuine contraction? A. Yes.

"Q. So that, whatever was the cause of that, you found her just as she has described herself? A. Yes.

"Q. There was no faking? A. No, I do not think so."

This brings me to a consideration of the important evidence which has been discovered, and adduced, since the trial.

At the trial the plaintiff sought to increase greatly her damages by asserting, and endeavouring to prove, that, at the time of the accident, she was earning about \$2,700 a year. Her story was, that she was paid \$16 a week for wages, and earned, in addition, about \$2,000 a year by way of "commissions;" some admitted errors, in the particulars of the latter earnings, reduced the total to some extent; but, in the main, she maintained, upon oath, that they had been earned and received by her. Her case, if true, would obviously be an extraordinary one; it would be extraordinary if a young woman, employed as a typewriter in a company carrying on a business of no vast extent, were paid by it, or by it and its president, about \$2,700 a year; and extraordinary also that no trace, of anything like a satisfactory character, of where the money went to, could be found.

Some suspicion was thrown upon her statement as to the amount of her wages, by the production of the "wage book" of the company by which she was employed, shewing that the amount which she asserted was paid to her weekly, was paid

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by the company only once a fortnight, and her "bank book" shewed deposits accordingly; but the president of the company, and she, both testified that, although that was so, he, out of his private purse, paid her an equal amount fortnightly, making up the sum which she asserted—\$16 a week at the time of the accident; but nothing whatever, in writing, was produced to support this testimony, or to shew where the money went, though, as I have said, the plaintiff's bank book gave evidence of the fortnightly receipts of the wages paid to her by the company. Additional suspicion was thrown upon her statements, as to her earnings, by the elicitation of facts which make it plain to me that some of the items, contained in her particulars of commissions earned and received by her, were really payments made for household expenses of the president of the company, and for goods purchased by the company. And still further suspicion was created by the absence of the one book of the company, which would have demonstrated the truth or falsity of many, if not all, of the items of these particulars. The outstanding item, however, in them, is that of the 17th August, amounting alone to \$1,355.27, the greater part of the whole sum of them; this, the plaintiff asserted, represented her commission on the five or six matters mentioned in the stub of cheque for the amount; originally there was only one entry upon the stub, and that was the name of the Bertram Company of Dundas, written in ink, the other entries have been since made in pencil. After the trial, on account of an anonymous letter giving to the defendants some information, inquiry was made which led to the giving of the additional evidence in this Court, evidence which makes it quite plain that this amount was not paid to the plaintiff for commissions, or to her at all; but was paid to the Bertram Company of Dundas, by the president of the company which employed the plaintiff, for money coming from him to them in respect of a transaction had between them; so that there seems to me to be no escape from the finding that the plaintiff's story, as to her earnings by way of commissions, is almost wholly untrue; and, if that be so, how are we to judge between the opinions of those who considered that she was suffering from hysteria and of him who was firmly of the opinion that she was



malingering? In that state of affairs, I would be much helped by a re-statement of the opinions of all of these gentlemen in the light of the development of the case since they were last expressed.

But, if that is not to be, I would reduce the damages to \$7,000, which I feel quite sure is, to say the least of it, a fair compensation.

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MOSS, C.J.O., MACLAREN and MAGEE, JJ.A., concurred.

*Damages reduced; no costs of appeal.*

[IN THE COURT OF APPEAL.]

FLEMING v. TORONTO R.W. CO.

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*Negligence—Street Railway—Injury to Passenger—Electric Explosion—Conduct of Motorman—Findings of Jury—Evidence—Inspection—Recollection of Witness—Written Report—Improper Rejection—New Trial.*

The plaintiff was a passenger upon an electric street-car of the defendants, when an electric explosion occurred in the car, and the plaintiff was injured by being forced out of the car and thrown upon the ground by his panic-stricken fellow-passengers. In an action to recover damages for his injury, he alleged as negligence on the part of the defendants, among other things, that they had not properly inspected the controller. At the trial, which took place thirteen months after the explosion, the defendants called as a witness the foreman at one of their barns to shew that there had been a proper inspection. The witness could not, from memory alone, testify to an inspection shortly before the accident. Counsel for the defendants proposed to put into the witness's hands a report, signed by him in the usual course of his work, shewing that the car had been examined three days before the explosion. Upon objection by the plaintiff, the trial Judge ruled that the witness could not refresh his recollection by looking at the report, unless he had a recollection to refresh, which he did not profess to have; and, therefore, excluded the testimony. The jury found negligence on the part of the defendants in that: (1) the motorman was incompetent to handle a car in case of emergency; (2) had he used the air-brake, the car could have been brought to a stop before the accident happened; and (3) that the car was not properly inspected; and judgment was entered for the plaintiff:—

*Held*, upon appeal, that the testimony of the foreman was improperly rejected.

*Held*, also, *per* MEREDITH, J.A., that the finding as to the incompetence of the motorman afforded, in itself, no cause of action; and that there was no reasonable evidence of negligence on the part of the motorman in failing to apply the brakes before seeking to reassure the passengers and to have the electric current cut off by the removal of the pole from the wire.

A new trial was directed.

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APPEAL by the defendants from the judgment of MIDDLETON, J., at the trial, upon the findings of a jury, in favour of the plaintiff, for \$1,200.

The plaintiff, by his statement of claim, delivered on the 17th December, 1910, alleged as follows:—

(2) The plaintiff, on the 10th day of August, 1910, became a passenger to be carried for reward on the defendants' railway, on a King street car going east.

(3) The car upon which the plaintiff was riding stopped at Sherbourne street, and, upon starting again from Sherbourne street, there was an explosion, and, shortly after, the front part of the car took fire.

(4) The car proceeded at a very high rate of speed, and many of the passengers, becoming alarmed, as the fire was spreading, in order to save themselves, jumped from the car, and the plaintiff, being on the end of a seat, was forced out of the car by the passengers seeking to escape, and thrown to the ground.

(5) The plaintiff lit on his head and side; his right eye, cheek, and shoulder were badly injured; two ribs were fractured; his right hip and knee were badly injured; and he received other injuries and severe shock.

(6) The plaintiff has up to the present time been unable to attend to his work and has incurred medical and other expenses.

(7) The plaintiff's injuries are permanent.

(8) The plaintiff charges and the fact is, that the accident was due to the negligence of the defendants; such negligence consisting in the defendants not having properly inspected the controller, or, if so inspected, in not having it put in proper order, and in leaving the said controller out of repair or not in proper condition to be in operation; and in having the cars overloaded, and thus giving the controller too much strain; and in the motorman turning the power of the controller on too suddenly when overloaded; neglecting to turn off the power after the controller blew out; and in the motorman deserting his post and leaving the car to run away; and in the conductor and motorman neglecting to pull the pole off the wire, and thus stop the car; and in the defendants permitting the car in ques-

tion to be operated by an inexperienced and incompetent motorman; and in the failure of the motorman to apply the brake; and in the defective form and design of the car, and the crowding of the same, both of which impeded the conductor in the discharge of his duties; and in using a circuit breaker of inferior design and defective condition, and in using a defectively constructed controller.

Particulars delivered under the statement of claim were as follows:—

The defective form and design of the car consists in having the seats too close together; in having a running board on the outside of the car, instead of a passage in the centre of the car; and the defect in the general arrangements, so that the employees cannot pull down the trolley pole in an emergency or when required.

Insufficiency of provision for electrical transmission in portions of the equipment circuits; insufficiency of provision for insulation between portions of the equipment circuits; insufficiency of provision for insulation in the circuit breaker when open; insufficiency of provision for fire protection in case of trouble in the equipment circuits; defective insulation of and insufficiency of provision for electrical transmission in portions of the equipment circuits; insufficiency of provision for shutting off the power when the circuit breaker failed to serve its purpose at the time of the accident.

The particulars in reference to the controller are as follows: defective insulation and too low conductivity in the circuit.

The defendants pleaded "not guilty by statute," referring to R.S.O. 1897, ch. 207, sec. 42; 55 Vict. ch. 99, secs. 1, 4, 17, 18.

The trial was on the 25th, 26th, and 27th September, 1911.

Certain evidence was rejected at the trial, as set out in the judgment of MACLAREN, J.A., *infra*.

The questions submitted to the jury and their answers were as follows:—

"1. Was the accident caused by the negligence of the defendants? A. Yes.

"2. If so, what was that negligence? Answer fully. A. We believe the motorman was incompetent to handle a car in case of

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emergency. Had he used the air-brake, the car could have been brought to a stop before the accident happened. And we also believe the car was not properly inspected."

The jury assessed the plaintiff's damages at \$1,200; and the trial Judge directed judgment to be entered for that sum, with costs.

By an order of Moss, C.J.O., in Chambers, dated the 21st October, 1911, the defendants were allowed to appeal directly to the Court of Appeal.

December 4 and 5. The appeal was heard by Moss, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

*D. L. McCarthy*, K.C., for the defendants, argued that there was no evidence to justify the finding of the jury that the motor-man was incompetent to act in an emergency. Neither was there evidence to justify the finding of the jury that the car was not properly inspected; and, in any case, the defendants were entitled to have their witness's memory refreshed by the inspection sheets, which were the only means a man had of refreshing his memory where numbers of cars are inspected night after night, and he is called upon to testify in regard to such inspection a year or more after the accident: *Phipson on Evidence*, 5th ed., pp. 466, 467. The learned trial Judge having, it was submitted, wrongfully refused to allow such refreshing of the witness's memory, a new trial should be granted.

*H. D. Gamble*, K.C., for the plaintiff, contended that there was ample evidence to support all the findings of the jury. The evidence of reports which was excluded was properly excluded. There could be no more dangerous evidence than the evidence of such reports, which might be cooked to suit the case of the party from whose custody they came. He referred to *Rosenberger v. Grand Trunk R.W. Co.* (1882), 32 C.P. 349: *Canada Central R.W. Co. v. McLaren* (1883), 8 A.R. 564.

*McCarthy*, in reply.

December 30. MACLAREN, J.A.:—This is an appeal by the defendants from a judgment for \$1,200 in a trial before Middleton, J., and a jury. The action was for damages sustained

by the plaintiff from an electric explosion in one of the company's cars, on which he was a passenger on the 10th August, 1910. The defendants contend that the evidence does not justify the findings of the jury; but, in case the Court does not accede to that view, they ask for a new trial, on the ground that the trial Judge improperly excluded material evidence tendered by them.

I consider that it would not be in the interests of justice that the case should be finally determined on the evidence admitted; but that there should be a retrial in order that the tendered evidence may be received.

In his statement of claim the plaintiff alleged that the accident was caused by the negligence of the company in "not having properly inspected the controller, or, if so inspected, in not having it put in proper order, and in leaving the said controller out of repair or not in proper condition to be in operation." The defendants pleaded "not guilty by statute."

The evidence excluded was on the examination of one Barton, a witness for the defence, who was the foreman at one of the company's barns and in charge of the inspectors and repairing at that barn, and superintended the work done there. The following are the material parts of the examination, which will shew how the difficulty arose:—

"Mr. McCarthy: Q. Now, can you speak, looking at the record, which I notice is signed by you, of the report of cars inspected on August 7th, 1910—

"Mr. Gamble: Is that evidence, my Lord?

"His Lordship: He can refresh his recollection. He must have a recollection to refresh. He must say, 'I recollect.'

"Mr. McCarthy: I don't suppose, my Lord, that I could ask a man to recollect what controllers were inspected on August 7th, last year?

"His Lordship: I do not suppose he can.

"Mr. McCarthy: Q. I don't suppose you can recollect what particular cars were examined on August 7th? A. No.

"His Lordship: . . . Unless the witness can say, 'I have a recollection,' he cannot use that in order to refresh his

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memory; but if, in the refreshing of his memory, he can say he can recollect, that can be used."

(After a discussion), "Mr. McCarthy: Q. So you have no way of recollecting when that car was inspected in August of 1910? A. Only by the sheets, that is all I can go by.

"Q. You have seen the sheets? A. I have seen the sheets. I have the sheets for six or seven years.

"His Lordship: I think the situation is plainly that the witness cannot recollect one incident in the case. All he can say is that he can go by the sheets.

"Mr. McCarthy: Subject to your Lordship's ruling, I would submit the question in reference to the sheets which he has.

"His Lordship: In 99 cases out of 100 it is not objected to, because we want to get at the actual facts; if the objection is taken, I am afraid I shall have so to rule, but it is against my own desire."

Mr. Gamble pressed his objection, and was proceeding to discuss the matter further, when his Lordship reminded him that he had ruled in his favour.

The law on the subject is, I consider, correctly laid down in Phipson on Evidence, 5th ed., p. 466, as follows: "A witness may refresh his memory by reference to any writing made or verified by himself concerning and contemporaneously with the facts to which he testifies. . . . The writing may have been made either by the witness himself, or by others, providing in the latter case that it was read by him when the facts were fresh in his memory, and he knew the statement to be correct."

In the present case, the question of the defendants' counsel was not completed, as he was interrupted before the sentence was finished; but the fair inference, from so much of the facts as was allowed to be brought out, is, that the sheets in question contained a daily record of the cars inspected or repaired, either prepared by the witness himself or examined by him at the time, and then certified by his signature from his personal knowledge. That the facts were not more fully brought out is owing to the premature objection of the plaintiff's counsel.

With great respect, I am of opinion that the rule laid down by the trial Judge is too narrow and is not justified by the

authorities. I think the law is more correctly stated by Phipson, 5th ed., p. 467, where he says: "It is not essential that the witness should have any independent recollection of the facts. Thus, an attesting witness, from seeing his own signature to a deed, may say that he is sure that the party has executed it (*Maugham v. Hubbard* (1828), 8 B. & C. 14); so, a barrister may refer to notes on his brief, though he has no recollection of the case (*R. v. Guinea*, Ir. Cir. R. 167); or an agent who has made a memorandum of the terms of a lease, but forgotten the transaction, may swear from seeing the memorandum he has no doubt the lease was granted (*Rex v. St. Martins* (1834), 2 A. & E. 210 . . .) And . . . a journalist may refer to the copy of an article written by him, although he has forgotten the facts narrated (*Topham v. McGregor* (1844), 1 C. & K. 320)."

I am of opinion that the appeal should be allowed with costs to the defendants in any event; the costs of the previous trial to be in the action.

MEREDITH, J.A.:—There are really but two questions for consideration, upon this appeal, because there are really findings of negligence in two respects only—failure to apply the brakes, and failure to discover and remedy the defect which was the cause of the accident: the finding as to the incompetence of the motorman affords, in itself, no cause of action; the incompetence of the man might have had some bearing upon the question of failure to apply the brakes, but otherwise it was immaterial, because, competent or incompetent, he was the defendants' servant, for whose conduct, in the course of his employment, the defendants are answerable; if the case had been one coming under the rule as to "common employment," the question might have been quite material; in this case it is not possible that it alone can be made a cause of action.

The first question, then, is, whether there was any reasonable evidence of negligence on the part of the motorman in failing to apply the brakes before seeking to reassure the passengers and to have the electric current cut off by the removal of the pole from the wire. And this question is not to be looked at as

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it may now appear, looking back upon the event and having days for considering what might have been done to have prevented the panic, on the part of the passengers in the car, which was the cause of the plaintiff's injury.

The explosion caused by the electricity was an unusually violent one; and the motorman got the brunt of it, and was somewhat stunned by it. His first act was to turn off the power, obviously the proper thing to do. Finding that that did not cut off the electricity, which would, if not cut off, burn up the car, and the quickest and best means of cutting it off being by detachment of the pole at the other end of the car, and the passengers being panic-stricken, not knowing what had happened, or what might happen next, he immediately turned to the body of the car and called to the conductor to detach the pole, and then to the passengers to keep their seats; and then back to his motor in the vestibule of the car, from which he had to be carried, owing to the injury which he had sustained.

In the imminent danger, there were three things which the man might have done, disregarding his own interests and safety in the interests and for the safety of his passengers: (1) get the power cut off; (2) reassure the passengers, who in their panic might injure one another; and (3) apply the brakes, so that there might be less danger in a panic; the man, in the instant, deemed the first two the most important, and left the third until he had done what he could to effect the other two; and it seems plain to me that no reasonable man could conscientiously say that in doing so he was guilty of negligence. That which was most urgent of all things was the cutting off of the power; unfortunately, the passengers, in their panic, threw the conductor twice off the car before the motorman's injunction to remove the pole from the wire could be obeyed; but he did not know, he could not tell, that it would not be immediately complied with; his reassurance of the passengers was next in importance; if it had succeeded, no one would have been injured; there would have been no need to stop the car, to prevent injury, if the pole were removed and the passengers remained in their seats; these things failing, it was important to stop the car as soon as possible, to prevent the additional



danger to panic-stricken passengers alighting from a car moving at a slow rate of speed over a car being stopped by the immediate application of the brakes. If the man had stopped to apply the brakes first, and then had turned to reassure the passengers and to call for the disconnection of the current, he might, much better, have been found fault with; but, whichever he did first, in the moment of the explosion and consequent fire, he could hardly be accused, reasonably, of negligence. In my opinion, there is no reasonable evidence to support this finding; and I desire to add that I hope all "competent" men may act in as courageous a manner upon such an extraordinary occasion of—if judged by the panic of the passengers—very considerable cause for alarm, as this man, found by the jury to be "incompetent," did. I would accordingly favour a dismissal of the action for these reasons, but, at the least, the defendants are surely entitled to a new trial, and that is the opinion of the other members of the Court.

On the other branch of the case as well, the defendants are entitled, I think, to a new trial, because of the improper rejection of evidence. The plaintiff made a *prima facie* case of neglect, on the part of the defendants, to take reasonable care that the car was road-worthy and free from the defect which caused the accident. The defendants then proceeded to meet that case by testimony as to examinations to ensure road-worthiness and freedom from such defect; but, upon objection made on the plaintiff's behalf, the evidence in question was rejected, and rejected upon an erroneous ground, as is now generally admitted. The witness could not, from memory alone, testify to an inspection made shortly before the accident; it would hardly be possible that he could; it was then proposed to put into his hand a report, signed by him in the usual course of his work, shewing that the car had been examined at that time; but, upon such objection, that was prevented. If, looking at the report, the witness could have said, "That is my report, it refers to the car in question, and shews that it was examined at that time, and, though I cannot from memory say that it was then examined, I can now swear that it was, because I signed no report that was untrue, and at the time I signed this report I knew that it was true," that would,

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of course, be very good evidence, but the defendants were not allowed to get that far; and so the defendants are entitled to a new trial upon this ground also.

MOSS, C.J.O., GARROW and MAGEE, JJ.A., agreed in the result.

*Appeal allowed and new trial ordered.*

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[DIVISIONAL COURT].

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LESLIE V. PERE MARQUETTE R.W. Co.

*Railway—Severance of Farm—Undergrade Crossing—Agreement—Maintenance of Crossing—Right to Continuance—User for Twenty Years—Easement—Prescription.*

The judgment of CLUTE, J., 24 O.L.R. 206, was affirmed, on the ground that the plaintiffs' right to an undergrade crossing had been established as an easement by continuous user for twenty years.

APPEAL by the defendants from the judgment of CLUTE, J., 24 O.L.R. 206.

November 22. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and SUTHERLAND, JJ.

*R. J. Towers*, for the defendants, argued that, as the contract between the predecessors in title of the parties had been reduced to writing, and no fraud was alleged or proved on the part of the defendants, evidence should not have been received to vary the terms of the written instrument, and the learned trial Judge was not entitled to have regard to the "surrounding circumstances" connected with the transaction; that the evidence did not justify the conclusion arrived at by the trial Judge that there had been uninterrupted user of the undergrade crossing by the plaintiffs for over twenty years. Even if the evidence objected to by the defendants should be considered admissible, no case was made out for the reformation of the deed which contained the contract between the parties. It was very improbable that Douglas made any such agreement for the use of an underpass as is alleged; and in any case it was not competent for him to enter into such an arrangement: *Doran v. Great*

*Western R.W. Co.* (1857), 14 U.C.R. 403; *Wood v. Hamilton and North Western R.W. Co.* (1877), 25 Gr. 135; MacMurchy and Denison's *Railway Law of Canada*, 2nd ed., p. 345. The cases of *McKenzie v. Grand Trunk R.W. Co.* and *Dickie v. Grand Trunk R.W. Co.* (1907), 14 O.L.R. 671, which were cited and relied upon by the learned trial Judge, are distinguishable from the case at bar. There was no agreement in the *McKenzie* case; while in the *Dickie* case there was an unsigned agreement. Here the facts are quite different, as we rely upon the deed executed by George Leslie, after consultation with his neighbours. The case falls within the principle laid down in *Oatman v. Grand Trunk R.W. Co.* (1910), 2 O.W.N. 21.

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*D. L. McCarthy*, K.C., for the plaintiffs, argued that the case fell within the principle of the *McKenzie* and *Dickie* cases, as held by the learned trial Judge. The underpass was in existence at the time the deed was given, and continued to be used from 1885 to 1906, and there is ample evidence to support the finding that it was used for more than twenty years. The facts are such as support the presumption that there was an agreement as to the use of the underpass, quite apart from the direct oral evidence on the point. The facts in the *Oatman* case are entirely different from those in question here.

*Towers*, in reply, referred to *Canada Southern R.W. Co. v. Erwin* (1886), 13 S.C.R. 162, *per* Gwynne, J., at p. 164, which laid down the principles applicable to this case.

December 30. The judgment of the Court was delivered by BRITTON, J.:—The plaintiffs are the owners of the north half of lot 6 in the front concession of the township of Moore, except that part heretofore conveyed to the Huron and Erie Railway Company.

For many years—it is said from 1885 to 1906—the owners and occupiers of this land enjoyed as of right an undergrade crossing, such as was necessary for the proper working of this land on both sides of the railway, the severance having been created by the railway. About the year 1906 the defendants filled in this crossing.

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The plaintiffs allege that, at the time of the agreement for the sale of land for the right of way for the Huron and Erie Railway, there was in fact an agreement for such an undergrade crossing.

The action is for: (a) specific performance of the alleged agreement; (b) a mandatory order compelling the restoration of the crossing; (c) an injunction restraining further interference with the plaintiffs in the use of the crossing; (d) a declaration that the plaintiffs are entitled to have the crossing maintained by the defendants; and (e) damages.

The learned trial Judge found in favour of the plaintiffs for the undergrade crossing, and assessed the plaintiffs' damages at \$200: see 24 O.L.R. 206.

It was admitted at the trial that, for the purposes of this action, the plaintiffs stand in the position of George Leslie, the grantor, and that the defendants stand in the same position as the Huron and Erie Railway Company, having all the rights and being subject to all the liabilities of that company.

At the trial and upon the argument, the plaintiffs contended that, apart from any express agreement at the time of the agreement for sale of right of way, they, the plaintiffs, had, subsequent to the sale of right of way and prior to 1906, acquired this undergrade right of way, by prescription. If that claim has been established, it will not be necessary to consider the other branches of the case.

The learned trial Judge found as a fact that the plaintiffs have acquired an easement in what is called the undergrade pass. His words are (24 O.L.R. at p. 209):—"Having regard to the surrounding circumstances and the evidence, I have no doubt whatever that it was a part of the agreement and arrangement made at the time of the purchase of the right of way that the said George Leslie should have an underpass for the use of his farm for waggons and cattle to pass thereunder. This pass was in fact established; the railway fence was turned in to the two posts on each side of the centre opening, and gates were put upon both sides of this opening; and I find as a fact that the pass was used in connection with and for the purposes of the farm for over twenty years. After a time, the trellis work was

filled in up to the pass, and this was planked up to prevent the earth from falling into the pass, and so it continued down to the year 1906. It would appear that in the first instance two gates were placed, one on each side of the pass, and that, after it was planked up, only one gate appears to have been in use. I do not accept the evidence of the defendants' witnesses that the fence along the railway ever extended across the opening so as to close the pass. Having regard to the location of the farm and the necessity for having a pass for the cattle to go down to drink, the evidence of the defendants' witnesses upon that point, contradicted as it is by the plaintiffs' witnesses, to me is incredible. I think they are mistaken." And at p. 213: "While I desire my judgment to proceed mainly upon the principle laid down in the *McKenzie* case,\* I am also of the opinion that the plaintiffs have established an easement by continuous user as of right for over twenty years."

There is evidence to warrant that finding. The Judge discarded the evidence of some of the witnesses and accepted the evidence given by others. He, having seen and heard the witnesses, was in a better position than we are in appeal. But, apart from that, if asked to make a finding upon the notes of evidence in our possession, my conclusion would be, that the easement has been established. Let it be granted that the farm was entitled to a crossing at the time when the railway was constructed, and after—an underpass would seem more reasonable and economical from the railway standpoint. If in the long past it was better for all parties, they would naturally have an understanding and agreement in reference to the pass, and act upon it.

Upon my reading of the evidence, I am of opinion that the Leslies as of right used the underpass, and the predecessors of the defendants, and the defendants, knew that this pass was being used by the owners and occupiers of the farm, as of right, and the defendants did not attempt to interfere to prevent its user until 1906.

The appeal should be dismissed with costs.

\**McKenzie v. Grand Trunk R.W. Co.*, 14 O.L.R. 671.

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## [IN THE COURT OF APPEAL.]

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TORONTO CLUB V. DOMINION BANK.

TORONTO CLUB V. IMPERIAL BANK OF CANADA.

TORONTO CLUB V. IMPERIAL TRUSTS CO. OF CANADA.

*Bills of Exchange—Conversion—Incorporated Club—Cheques Payable to Order of Club—Authority of Secretary to Indorse—Cheques Cashied by Banks and Proceeds Misapplied by Secretary—Cheques Deposited to Credit of Secretary in Private Account with Trust Company—Non-liability of Banks—Liability of Trust Company—Negligence—Restitution Cheques—Reduction of Liability.*

The secretary of an incorporated club (the plaintiff) received from members of the club, in payment of their dues, certain cheques, payable to the order of the club, indorsed them in the club's name, signing his own name as secretary, and, instead of depositing them at the club's bank to the club's credit, procured cash for them from two banks (defendants), and dishonestly retained it. By the rules of the club, the secretary was to receive all club moneys and pay all accounts; and the entrance fees, subscriptions, and dues were to be paid to him:—

*Held*, upon the evidence, that the secretary had general authority from the club to indorse cheques in its name, and that these defendants were not liable to the club for the conversion of the cheques; MACLAREN, J.A., dissenting.

Judgment of BOYD, C., affirmed.

The secretary similarly indorsed other cheques of members and deposited them to his own credit with the third defendant, a trust company, his banker, and drew out the amounts deposited and dishonestly retained them, but restored to the club a portion, by drawing five cheques upon the trust company and depositing them to the club's credit at its own banker's:—

*Held* (MEREDITH, J.A., dissenting), that the trust company was, in the circumstances, negligent in receiving these cheques, plainly the property of the club, and in placing the proceeds, either before or after collection, to the credit of the secretary in his own personal account; and the trust company was, therefore, a party or privy to the secretary's breach of trust, and accountable to the club in respect of the amount of the cheques so received, less, however the amount restored by means of the five cheques.

Judgment of BOYD, C., reversed.

THESE actions were brought for the alleged conversion by the defendants respectively of certain cheques belonging to the plaintiff and alleged by the plaintiff to have been indorsed and delivered to the defendants respectively, without any authority, by the plaintiff's secretary; or, in the alternative, to recover the amount of the conversions in each case, as money had and received by the defendants for the use of the plaintiff.

The defendants denied liability; and the defendant the Imperial Trusts Company of Canada, in addition, claimed to be

entitled, if held liable, to credit for certain payments made by the secretary to the bankers of the plaintiff, alleged to have been made by way of restitution to the plaintiff.

June 14 and 15, 1909. The three actions were tried together, at Toronto, before BOYD, C., without a jury.

*G. F. Shepley*, K.C., for the plaintiff.

*I. F. Hellmuth*, K.C., *G. H. D. Lee*, and *H. E. Redman*, for the defendant the Dominion Bank.

*I. F. Hellmuth*, K.C., *J. Bicknell*, K.C., and *J. W. Bain*, K.C., for the defendant the Imperial Bank of Canada.

*A. McLean Macdonell*, K.C., for the defendant the Imperial Trusts Company of Canada.

June 18, 1909. BOYD, C.:—The result of all the evidence, oral and documentary, leads to the belief that the secretary of the club had all along power to indorse negotiable instruments, exercisable according to the discretion and honesty of each individual secretary. The secretaries before Harbottle acted honestly and kept the club moneys separate in the club's bank, subject to the control of the head and certain officers of the club, as indicated in Mr. Osler's letter of the 19th September, 1900. Former secretaries appeared to have used two kinds of rubber stamps for indorsement, one simply "The Toronto Club" and the other "Pay to the order of the Dominion Bank for the Toronto Club, ———, secretary." But, whether the longer or shorter form of words was used, the signature of the secretary was the completion of the indorsement, and it was still open to him, if he chose, on either indorsement to draw the money for the cheque, instead of depositing it as commercial paper. Harbottle departed from the practice of the earlier secretaries by paying only part of the club cheques received into the club's bank. The larger part was so applied, but a minor part he cashed or handled, so as to have the amounts deposited subject to his own control. The officers and members knew, or had means of knowing, that he was in the habit of depositing and cashing members' cheques to the club, for the accommodation of the members; and it was apparently left to his own discretion as to how far or to what extent this should be done. The de-

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fendants were not aware and were not informed that any restrictions were placed upon him in this respect (and none in fact have been made to appear); and in the usual course of business they received cheques properly indorsed by him and credited him with the proceeds. I think he had authority to indorse in this general way, and that his acts were not conversions of the property, as between him and the club. The money so deposited may be regarded as trust money of the club, and the defendants were not cognizant, before or after, of any breach of trust by him: *Shields v. Bank of Ireland*, [1901] 1 I.R. 222.

To shew the general scope of the secretary's authority, I would refer to the rules of the club, No. XVI.: "The secretary . . . shall . . . receive all club moneys, and pay all accounts;" and XXIII.: "All entrance fees, subscriptions, and dues shall be paid to the secretary." And in a letter of the president, dated the 23rd May, 1905, it is said: "Under the present arrangement, the chairman and committee take no part in the management of the club, and must look to the auditor to be satisfied that the secretary is charging himself with all the moneys that he ought to be charged (*sic*), and is taking credit for no more sums of money than are proper."

Under that large financial control, Harbottle acted as secretary from his appointment in January, 1905, till his peculations were discovered at the end of 1907. These actions are to recover the amount of various cheques sent to him as secretary by the members, or received by him as club moneys, and cashed by or deposited in the institutions of the defendants. For the plaintiff it was argued that Harbottle's sole power was to indorse in a restricted way, *e.g.*, "for deposit in the Dominion Bank only," and that no title was given to the club cheque unless thus indorsed; for the defendants, the broad contention was, that he had unrestricted power of indorsement, and that all cheques indorsed by him, taken in good faith and for value, were validly received by the defendants. This latter is, to my mind, the correct view.

It is not needful to go through the details item by item. There is no specific proof given as to any one cheque that the money was misappropriated by the secretary; but, assuming



such accurate proof, the result would not be affected if the general principle stated applies to the transaction as a whole. All the defendants' dealings are protected by their status of being *bonâ fide* holders for value of negotiable securities properly indorsed. The fact of the abuse of the secretary's powers in any single instance is not brought home to the defendants; and their position, therefore, can well be maintained.

The plaintiff has failed to prove that the secretary had only a limited authority to indorse, or that he could indorse only for the purpose of paying the money into the club's bank, and upon such failure the cases relied on for the plaintiff are not applicable.

The law which governs this litigation is expressed by the Privy Council in *Bryant Powis and Bryant Limited v. Banque du Peuple*, [1893] A.C. 170, at p. 180, in words adopted from the judgment of Andrews, J., that the fact of the agent abusing his authority and betraying his trust cannot affect *bonâ fide* holders for value of negotiable instruments indorsed by him apparently in accordance with his authority. This case was followed and applied in *Hambro v. Burnand*, [1904] 2 K.B. 10.

It is not necessary to dwell on the special features of the defence of the Imperial Trusts Company. As to the greater part of the claim, I think the fair inference from the evidence is, that the breaches of trust as between the secretary and the club were repaired by the repayments made by him to the club; but, upon the whole of their liability, they are on the same footing as the other defendants.

The result is, that the actions stand dismissed with costs.

September 15, 1909. An order was made by GARROW, J.A., in Chambers, allowing the plaintiff to appeal from the judgment of BOYD, C., direct to the Court of Appeal.

October 9 and 10, 1911. The appeal was heard by GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

A. W. Anglin, K.C., for the plaintiff. The learned trial Judge erred in basing his judgment on the assumption that the onus is upon the plaintiff to shew that Harbottle had no auth-

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ority to deal as he did with the cheques in question. It is submitted by the appellant that, on the contrary, the onus is throughout on the respondents, who must shew that the secretary had not only authority to sign for the plaintiff, but also to use the cheques in the manner proposed: Bills of Exchange Act, sec. 51. They should have required production of the authority under which the agent acted: *Attwood v. Munnings* (1827), 7 B. & B. 278. "Limited authority to sign" (sec. 51) may mean authority to sign for specific purposes only: Paget's Law of Banking, 2nd ed., pp. 258, 259; Halsbury's Laws of England, vol. 1, sec. 1217; *Gompertz v. Cook* (1903), 20 Times L.R. 106; *Hannan's Lake View Central Limited v. Armstrong and Co.* (1900), 16 Times L.R. 236; *Russo-Chinese Bank v. LiYan Sam*, [1910] A.C. 174, 184. It is also submitted that the terms of the statute 41 Vict. ch. 67, sec. 2, providing that the club may indorse bills by president and secretary, prove that the secretary alone had no authority, express or implied, to indorse as he did. The Act does not expressly refer to cheques, but a cheque is a bill of exchange: *Boyd v. Nasmith* (1888), 17 O.R. 40, 44; *Charles v. Blackwell* (1877), 2 C.P.D. 151, 155. The club is a social organisation, not a trading corporation, and might not have power at common law to indorse, or might only have power to indorse under seal. In any case, express power given by statute to indorse in a certain way excludes power to indorse in any other way, and particularly in any less formal way: *Hannan's Lakeview* case, *supra*, which is curiously parallel to the case at bar. The club's charter is a public Act, and the defendants were, therefore, peculiarly bound to know its provisions, and cannot rely on ignorance. Even if the onus to shew absence of authority were on the plaintiff, the onus is in law satisfied by the statute. Not only could there be no actual authority under the Act, but there could be no estoppel against it. Every one is bound to know the charter of a company he deals with: *George Whitechurch Limited v. Cavanagh*, [1902] A.C. 117, at p. 131. The learned trial Judge seems to think that the rules of the club authorised the secretary to act as he did, and refers to rules XVI. and XXIII. in this connection. But there is nothing in these rules to give the authority con-

tended for, and it is clear that neither power to receive moneys, nor power to pay all accounts, nor power to transact business, gives power to indorse cheques and receive the proceeds: Halbury's Laws of England, vol. 2, sec. 837; *Kilgour v. Finlayson* (1789), 1 H. Bl. 156; *Hogg v. Snaith* (1808), 1 Taunt. 347; *Beveridge v. Beveridge* (1872), L.R. 2 Sc. App. 183; *Great Western R.W. Co. v. London and County Banking Co.*, [1901] A.C. 414, especially *per* Lord Davey, at p. 419; *Charles v. Blackwell*, *supra*; Story on Agency, 9th ed., p. 113; *Gore Bank v. Meredith* (1866), 26 U.C.R. 237, 242; *Munson v. Collingwood* (1859), 9 C.P. 497; *Smith v. Collingwood* (1860), 19 U.C.R. 259. The cases of *Bryant Powis and Bryant Limited v. Banque du Peuple*, [1893] A.C. 170, at p. 180, and *Hambro v. Burnand*, [1904] 2 K.B. 10, which are cited and relied upon in the judgment appealed from, are distinguishable, inasmuch as these were cases of abuse, not of excess, of authority. In these cases there was compliance with the terms of a written authority, while here the question is one of an implied authority, which, we say, did not exist. Even if this should be considered a case of abuse of authority, the relation between the plaintiff and its secretary was that of master and servant, and the case is similar to *Grant v. Norway* (1851), 10 C.B. 665; and *Coleman v. Riches* (1855), 16 C.B. 104. See also *British Mutual Banking Co. v. Charnwood Forest R.W. Co.* (1887), 18 Q.B.D. 714. None of the requisites for an estoppel exists in this case, nor has it been found by the judgment or contended for in the reasons against appeal. There was no holding out or representation on the part of the plaintiff which would justify the application of the doctrine against it in the present case. Even if there were a holding out as to one cheque, it would not, of itself, extend beyond that cheque. The following cases were also referred to in this connection: *Colonial Bank v. Cady and Williams* (1890), 15 App. Cas. 267; *Farquharson v. King*, [1902] A.C. 325; *Bank of Ireland v. Evans's Charities* (1855), 5 H.L.C. 389; *Patent Safety Gun Cotton Co. v. Wilson* (1880), 49 L.J.C.L. 713; *Fine Art Society v. Union Bank of London* (1886), 17 Q.B.D. 705; *Keptigalla Rubber Estates v. National Bank of India*, [1909]

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2 K.B. 1010; *Employers' Liability Assurance Corporation v. Skipper* (1887), 4 Times L.R. 55; *Lewes Sanitary Steam Laundry Co. v. Barclay* (1906), 95 L.T. 444.

*I. F. Hellmuth, K.C., and J. Bicknell, K.C. (G. B. Strathy with them)*, for the respondent the Imperial Bank of Canada. The question is mainly one of fact, and there is ample evidence to support the findings of the learned trial Judge in favour of the respondents. No restriction was placed upon the secretary, who had complete control of the affairs of the club, and the case is thus distinguished from the *Gompertz* case, in which the agent's authority was subject to express restrictions. It is not necessary to prove a written authority—an implied authority is sufficient: *Lord v. Hall* (1849), 8 C.B. 627. The statutory provision by which the club was given power to indorse bills of exchange "under the hands of their president and secretary" had nothing to do with their internal management, and in no way restricted the implied authority of the secretary to indorse cheques, for which we contend. Reference to the head-note of the *Russo-Chinese Bank* case, cited on behalf of the appellant, shews that it has no application to the case at bar. See *Bank of Bengal v. Fagan* (1849), 7 Moo. P.C. 61, 74; *Bank of Bengal v. Macleod* (1849), 7 Moo. P.C. 35; *O'Reilly v. Richardson* (1865), 17 Ir. C.L.R. 74. Reference was also made to *Evans on Principal and Agent*, 2nd ed., p. 172; *Edmunds v. Bughell* (1865), L.R. 1 Q.B. 97. It is submitted that the respondents became the holders in due course of the cheques in question, and are not responsible for any abuse by the appellant's secretary of his authority. The evidence shews that the moneys in respect of which these actions were brought were properly paid to and received by the appellant, and were duly accounted for as shewn by its books, and that the misappropriation by the secretary was of money properly in his hands. The respondents rely upon the conclusions of fact of the learned trial Judge, and the cases cited in his judgment.

*I. F. Hellmuth, K.C., and G. H. D. Lee*, for the Dominion Bank, adopted substantially the argument presented on behalf of the Imperial Bank.

*A. McLean Macdonell*, K.C., for the respondent the Imperial Trusts Company of Canada, while also adopting the argument presented on behalf of the other respondents, further argued that, in any event, the appellant had been repaid the sums alleged to have been wrongfully converted by this defendant, and had, therefore, suffered no damage by reason of the transactions in question. Reference was made to the following cases: *Lacey v. Hill* (1876) 4 Ch. D. 537, in which the Court refused to apply the rule in *Clayton's Case* (1816), 1 Mer. 572; *The Mecca*, [1897] A.C. 286; *Hancock v. Smith* (1889), 41 Ch. D. 456; *Jacobs v. Morris*, [1902] 1 Ch. 816; *Marsh v. Keating* (1834), 1 Bing. N.C. 198; *Lewis v. Read* (1845), 14 L.J. Ex. 295; *Rodmell v. Eden* (1859), 1 F. & F. 542; *Hiort v. London and North Western R.W. Co.* (1879), 4 Ex. D. 188, 194.

*Anglin*, in reply, as to the alleged restitution, argued that it was inconsistent with the fact that Harbottle, in each case in which the plaintiff makes a claim, drew out the proceeds of converted cheques for purposes of his own, before making any payment to the club.

December 30. GABROW, J.A.:—These three cases were tried together before the Chancellor, who found for the defendants. The plaintiff appealed, and the appeals were also heard together.

The actions were brought claiming damages, and in the alternative as for moneys had and received, for the conversion of a large number of cheques payable to the plaintiff's order, which had come to the hands of the plaintiff's secretary, Mr. Colin C. Harbottle, and been by him indorsed to the defendants in the plaintiff's name "per pro.," and the proceeds received, and, it is said, dishonestly retained, by him. In all three cases, the main question was as to the authority of Harbottle so to deal with the cheques, although there were also minor differences in the circumstances of each case, such as the fact that the defendant the Dominion Bank was also the plaintiff's banker, and, in the case of the defendant the Imperial Trusts Company, that the cheques received by that company had been placed to his own credit in a running or investment account, and the proceeds subsequently withdrawn by him.

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The learned Chancellor found that Harbottle's authority was general; that he had power both to indorse and to receive the proceeds; and that the minor circumstances to which I have referred were insufficient, under the circumstances, to justify making a distinction between any of the three cases and the others, and he accordingly found for the defendants in all three.

There is, in my opinion, nothing in the plaintiff's contention that the provisions of 41 Vict. ch. 67 (O.) restricted or were intended to restrict the plaintiff's power. On the contrary, its plain intention seems to me to have been one of enlargement. Section 2 was inserted to aid the borrowing power authorised by sec. 1, and has, I think, no application to the circumstances with which we have here to deal.

Nor does there appear to be any other principle or question of law seriously involved or in dispute between the parties. The defendants do not dispute that the indorsements all being "per pro." places the onus upon them: see *Bryant Powis and Bryant Limited v. Banque du Peuple*, [1893] A.C. 170.

It is not claimed that any specific instructions were ever given to the secretary upon the subject of indorsing and dealing with such cheques. Nor is it disputed that from the beginning it had been the custom for the secretary to indorse them, usually but not invariably, for deposit with the plaintiff's bank, which was of course their proper destination. Under these circumstances, Mr. Anglin admitted that the secretary had authority to indorse for the purpose of deposit in the bank, but for no other purpose.

Harbottle does not appear to have presented any of the cheques to the defendant the Dominion Bank or the Imperial Bank in person. They were sent to the banks by the hands of other employees of the club, and the proceeds brought back to him. In the case of the Imperial Trusts Company, he had his private account there, and the cheques of the plaintiff which passed through the hands of that company were simply indorsed and then deposited to his credit.

The cheques were usually for sums under \$100. There were over 70 cheques, for a total of \$2,805, in the Imperial Trusts Company, 38 in the Dominion Bank, for a total of \$1,583; and in the Imperial Bank, 280, for a total of \$10,022.

In addition to the cheques in question, there were a number of other cheques taken and cashed by the club for the accommodation of members, which were also indorsed in the plaintiff's name, and the proceeds received by Harbottle, of which no complaint is made.

The written or printed rules of the plaintiff as to the secretary's duty and authority are the following:—

"XVI. The secretary shall keep correct minutes of the proceedings of the club, also all necessary books of account, and shall also *receive all club moneys*, and pay all accounts. He shall discharge all duties assigned to him by the committee of management, shall be paid such salary as the committee may decide, and shall hold office during pleasure."

"XXIII. It shall be the duty of the secretary to notify all members whose debts or obligations to the club or the steward thereof have remained unpaid for one month; and no member shall be allowed to vote for the election of a member, or to exercise any of the privileges of membership in the club, until such debt or obligation is satisfied. *All entrance fees, subscriptions, and dues shall be paid to the secretary.*"

There was no rule, order, or direction of any kind whatever from any one in authority upon the subject of the indorsement of cheques. During the life of the club—beginning as far back as the year 1864—many thousands of them had passed through the hands of the various secretaries, all of which had been indorsed by the secretary. Former secretaries, who were honest men, did not abuse their power. They deposited the cheques received with the club's bankers, and, at least in the later years, in so doing used a rubber stamp with the words, "for deposit only." But there is nothing to shew that such a stamp was ever prescribed by the plaintiff or by any one having authority in its behalf. Mr. Ogden, who was secretary from 1878 to 1894, says that the suggestion to use such words came from the bank, saying in his evidence: "Well, that is the way the bank wanted them."

There is nothing anywhere to limit or modify the written authority contained in the two rules before set out, that the secretary "*shall receive all club moneys, and pay all accounts,*"

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and that "all entrance fees, subscriptions, and dues shall be paid to the secretary." Every penny now claimed from these defendants, whose good faith in the several transactions no one questions, could, therefore, have been paid to the secretary in cash.

The committee must have known that payments were usually made by cheque and not in cash. The members of the committee themselves doubtless paid in that way. And they must also have known that they were being indorsed by the secretary in the plaintiff's name. The secretary was a trusted official. He was, indeed, for all practical purposes, the manager of the club in financial matters. Mr. Ogden, so long secretary, was asked: "Q. The chairman signed cheques for paying bills? A. Yes. Q. But the secretary indorsed all cheques? A. Yes. Q. And if a cheque was to go to the steward, he would indorse it? A. Yes. Q. The secretary would indorse it? A. Yes, to the steward's order. Q. And in whatever way the secretary saw fit; in other words, the secretary managed the financial affairs of the club? A. Yes."

Mr. Eustace Smith, another ex-secretary, was asked: "Q. And practically, I suppose, as Mr. Ogden says, you managed the club and its financial affairs while you were there? A. Practically."

Mr. Barnes, the hall porter for many years, was asked: "Q. And all the time you were there during Mr. Harbottle's and other secretaries' terms of office, you have taken your instructions from the secretary? A. Yes. Q. He is the chief, and practically sole, manager of the club? A. Yes."

Mr. Pepler, the manager of the Toronto branch of the Dominion Bank (the plaintiff's bankers) and also a member of the plaintiff's committee, said:—

"Q. Mr. Pepler, as it appears, you were part of the committee of management of the Toronto Club? A. Yes.

"Q. And as a member of the committee of management you were perfectly well aware that Mr. Harbottle, as secretary of the club, was the only person who ever indorsed cheques for deposit or cashing? A. Yes.

"Q. None of the cheques payable to the order of the Tor-



onto Club had, during your time, been indorsed by anybody except the secretary or the acting secretary? A. No, not to my knowledge.

"Q. The president or the committee had never indorsed the cheques that were made to the order of the Toronto Club, so far as you know? A. No.

"Q. And the only person who was authorised to indorse, so far as you were aware, either as a member of the committee or as the manager of the Dominion Bank, was the secretary of the club? A. Yes.

"Q. And was any limitation on his authority to indorse ever communicated to you before you were a member of the club? A. No.

"Q. Did you ever hear of any limitation? A. No.

"Q. And, therefore, you knew he had authority to indorse, and you did not know of any limitation to his authority? A. No.

"Q. And Mr. Harbottle was the only person who dealt with the finances of the club as its manager? I mean so far as indorsing cheques or paying accounts? A. Yes, unless he was away temporarily.

"Q. And he was an absolutely trusted servant of the club? A. Yes.

"Q. And put forward by the committee of the club as the person to transact the business of the club? A. Yes.

"Q. To you as manager, in your dual capacity, by you, as one of the committee? A. Yes.

"Q. And on the committee of the club were such bankers as Mr. Wilkie, one of the members, was he not, of the committee? A. Yes.

"Q. And other gentlemen of business and banking experience? A. Yes.

"Q. And they all knew that Mr. Harbottle was the only person who indorsed for the club the cheques? A. Yes.

Evidence to the same effect was also given by Mr. Henry C. Osborne, another member of the committee:—

"Q. . . . During the time you were a member of the committee, was there any limitation placed upon Mr. Harbottle's authority? A. None whatever.

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“Q. He managed the club or the financial affairs of it? A. Practically speaking.”

And there is finally the very illuminating letter from Mr. Walter Barwick, the chairman, to Mr. Andrews, the auditor, of the 3rd May, 1905, or shortly after Harbottle's appointment, in which Mr. Barwick says: “Under the present arrangement, the chairman and committee take no part in the management of the club, and must look to the auditor to be satisfied that the secretary is charging himself with all the moneys that he ought to be charged, and is taking credit for no more sums of money than are proper.”

Upon the whole, I am of the opinion that there was reasonable evidence to justify the learned Chancellor's finding that Harbottle's authority was general, and that, in so far as the defendants the banks are concerned, we have not been shewn on this appeal any sufficient reason for arriving at a contrary conclusion.

But, even granting Harbottle's authority to indorse and receive the proceeds, the situation of the defendant the Imperial Trusts Company is, I think, substantially different. To begin with, it is not a bank, but a trust company, organised, I assume in the absence of evidence to the contrary, under the provisions of the Ontario statutes in that behalf: see R.S.O. 1897, ch. 206, the schedule to which indicates the general powers which may be exercised by such a company. The agreement set out in the trust company's statement of defence, upon the terms of which it is said the account was opened, provides for an investment by it of the moneys to be deposited, repayable, with any additions thereto, upon demand, or upon thirty days' notice, at the option of the company, with interest thereon at four per cent. half-yearly. The company was to take all interest and profits over the four per cent. as its remuneration for the guarantee and management. The transaction was, therefore, one in which both were interested, and from which, presumably, both expected to derive a profit.

The account began in December, 1906, the year in which Harbottle became secretary; but the first deposit of the club's cheques, so far as appears, was only made in the month of Sep-

tember, 1907. In that month he deposited the club's cheques to the amount of \$274.45; in October, to the amount of \$1,117.60; and in the month of November, to the amount of \$1,327.40: or, in all, to the amount of \$2,719.45, in these three months.

That in doing as he did Harbottle was committing a palpable fraud and breach of trust, no one can doubt. And it seems to me impossible to escape from the conclusion that the trust company was, in the circumstances, negligent in receiving such cheques, plainly the property of the club, and in placing the proceeds, either before or after collection, for I see no difference, to the credit of Harbottle in his own personal account.

A bank, in view of its position and responsibility with reference to its customers' cheques, is given a certain amount of immunity; but even it must regard the facts when they plainly point to wrongdoing: see *Gray v. Johnston* (1868), L.R. 3 H.L. 1, at p. 11; *Bailey v. Jellett* (1884), 9 A.R. 187; *Clench v. Consolidated Bank of Canada* (1880), 31 C.P. 169, at p. 173; *Coleman v. Bucks and Oxon Union Bank*, [1897] 2 Ch. 243.

By the terms of the written agreement under which the account with this defendant was opened, no money could be withdrawn without its consent except after thirty days' notice. And, while one or more of the plaintiff's cheques might have passed with impunity, it seems to me quite impossible so to regard the large and almost continuous stream of them received in such a short space of time, without inquiry from Harbottle himself even, so far as appears, as to how he claimed to have become entitled to deal with them as his own.

The circumstances are not at all like those in the recent case of *Ross v. Chandler* (1909), 19 O.L.R. 584, affirmed in the Supreme Court (1911), 45 S.C.R. 127, which was regarded as very near the line.

It is one thing to cash a cheque over the counter to an official who has power to indorse and to receive the proceeds for his employer, and quite another to receive it and apply it not for the employer's but for the official's use. There might reasonably, in the former case, be a presumption that the official will deal honestly with the proceeds, but in the latter, where he in effect puts the money into his own pocket, the presumption would be all the other way.

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The result is, to make the defendant the Imperial Trusts Company, a party or privy to Harbottle's breach of trust, and therefore accountable to the plaintiff in respect of the cheques so received by it, amounting in all to the sum of \$2,719.45, but from which should, I think, be deducted the sum of \$2,542.10, the proceeds of the five cheques drawn by Harbottle and deposited to the plaintiff's credit in the plaintiff's bank. These deposits were made while Harbottle was still secretary, and ought, under the circumstances, to be ascribed to an intention on his part to refund to the plaintiff so much of the proceeds of its cheques which he had wrongfully deposited with this defendant, and not to a repayment generally upon account. If he had withdrawn from this defendant the whole \$2,719.45, and had deposited it in the Dominion Bank to the plaintiff's credit, I do not see how any question could have been successfully raised. The wrong would in that case, so far as this defendant is concerned, have been fully repaired, and the same result should, I think, follow *pro tanto*, upon the partial reparation effected by the repayments in question.

The actions should, therefore, stand dismissed as against the defendants the Imperial Bank and the Dominion Bank, with costs, including the costs of the appeal; and the plaintiff should have judgment against the Imperial Trusts Company for \$177.-85, with interest from the 15th November, 1907; and, of course, with costs of the action and of this appeal, in so far as that defendant is concerned.

The costs in appeal will, of course, include those of the former hearing.

MACLAREN, J. A.:—These three actions were brought to recover the amount of a large number of small cheques drawn by members of the Toronto Club, payable to the order of the club, which the secretary indorsed and transferred to the defendants, appropriating the proceeds to his own use.

The Chancellor, who tried the three actions together, dismissed them, on the ground that the secretary had authority to indorse the cheques. The three appeals were argued together in this Court.

The club was incorporated by ch. 92 of the statutes of Canada of 1863. No mention of negotiable instruments is made in that Act; but in an amending Act, ch. 67 of the statutes of Ontario of 1878, it was provided by sec. 2 that "the club shall have power to draw, make, accept and indorse all bills of exchange and promissory notes necessary for the purposes of the club under the hands of their president and secretary after authority from the committee of the club so to do."

Later, the office of president was abolished, and the bankers of the club were notified that cheques on its account would be signed by the chairman or some other member of the committee and countersigned by the secretary. This instruction does not appear to have been varied in any way.

Section 2 of the Act of 1878 does not appear to have ever been applied in practice to the indorsing of members' cheques for dues, refreshments, etc. These were, as a rule, made payable to the order of the club, but sometimes to the secretary. The method followed in all cases by Mr. Ogden, who was secretary of the club from 1878 to 1894, and by his successors in that office up to and including Harbottle, who was appointed in January, 1905, was to indorse such cheques as secretary and deposit them to the credit of the club in its bank for collection. The mode of indorsement was not uniform; at times it was "for deposit only," at others to the order of the bank of the club, or a simple indorsement in blank, apparently as desired by the bank or arranged with the secretary. In the circumstances of this case, I am of opinion that it is of little or no consequence which of these forms was used for the indorsement of the cheques of members in favour of the club. The important fact is, that, so far as is shewn by the evidence, every one of such cheques (with the exception of a few that were by mistake made payable to the club, instead of to the then steward, who was entitled to them) was delivered to and deposited with the bank of the club by the five successive secretaries from 1878 to 1905. The learned Chancellor is, I think, in error when he says that "the signature of the secretary was the completion of the indorsement;" it becomes an indorsement only when completed by delivery: Bills of Exchange Act, sec. 2 (A).

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No express authority is proved as to the secretaries indorsing these cheques, except in the testimony of Mr. Ogden, quoted below; the implied authority should not, in the absence of evidence, be pressed beyond the uniform practice followed for twenty-seven years.

I am unable to find any evidence to support another statement in the judgment appealed from, that it was open to Harbottle "to draw the money for the cheque, instead of depositing it as commercial paper." There was certainly no express authority given him to do so, and it is abundantly clear from the evidence that no one of his predecessors nor Harbottle himself during his first three months as secretary acted as if they thought they had any such implied authority.

The judgment below bases the secretary's unlimited power of indorsement chiefly upon two of the rules of the club: (1) "XVI. The secretary . . . shall . . . receive all club moneys, and pay all accounts;" and (2) "XXIII. . . All entrance fees, subscriptions, and dues shall be paid to the secretary."

With great respect, I do not consider these to be a sufficient authority for such a proposition. I think the law is more correctly stated in Halsbury's Laws of England, vol. 2, sec. 837: "A general authority to receive and discharge debts does not of itself confer upon an agent the power of accepting and indorsing bills so as to charge his principal." See to the same effect *Murray v. East India Co.* (1821), 5 B. & Ald. 204; *Hogg v. Snaith*, 1 Taunt. 347; *Esdaile v. La Nauze* (1835), 1 Y. & C. (Ex.) 394; and *Gore Bank v. Meredith*, 26 U.C.R. 237, at p. 242.

Some stress was also laid upon a letter of the chairman of the committee of the 3rd May, 1905, and the statement of a former chairman, who speaks of the secretary "conducting the financial matters of the club;" but a reference to these shews that they have no bearing upon the question of indorsement of cheques at issue in these actions, and they do not carry the authority of the secretary as to indorsement any further than the rules above quoted, if indeed they carry it as far.

I fully agree with the opinion of the Chancellor that the law applicable to the authority of the secretary in this case is that laid down by the Privy Council in *Bryant Powis and Bry-*

*ant Limited v. Banque du Peuple*, [1893] A.C. 170, at p. 180, and that "the apparent authority is the real authority." In that case, and in most of the others in which it has been followed and applied, the authority was in writing. Here the original authority appears to have been merely verbal; at least there is no evidence of its having been in writing. The only evidence as to the original instructions is that of Mr. Ogden, who was the secretary from 1878 to 1894. After stating that at that time the steward did the catering in the dining room and these accounts were paid to him, his examination is continued as follows:—

"Q. With regard to the cheques for annual dues or entrance fees, those would reach you? A. Yes.

"Q. Had you any specific directions or instructions from the committee with respect to what you were to do with those? A. We had to deposit those.

"Q. What was the bank in your time? A. The Standard Bank.

"Q. What method did you pursue in identifying or indorsing the cheque before depositing it? A. In those days we had not a stamp; we used to say, 'For deposit only to the credit of the Toronto Club.'

"Q. Are you able to say, with regard to your whole sixteen years' tenure of office, whether that was the invariable practice with such cheques as that? A. As far as I can remember.

"Q. Did you ever do such a thing in your whole tenure of office as take a member's cheque to a bank and get it cashed? A. No, I cannot remember ever doing so.

"Q. Then, were you familiar with the practice in the secretary's office during the time of your successor, while Mr. Forlong was there, were you in and out a good deal and did you see a good deal of the practice? A. Yes.

"Q. Do you remember what Mr. Forlong did in respect of cheques that came to him, as secretary, payable to the club for obligations due by members of the club? A. Well, to the best of my recollection, he did what he used to do when I was there, because he used to take those cheques. I used to indorse them and he used to take them over to the Standard Bank and deposit them, and he kept up that custom as far as I can remember."

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Mr. Fraser, who acted as secretary for a few months after the death of Mr. Forlong in 1900, followed the practice of his two predecessors in depositing all cheques in the club's bank. Sometimes he indorsed by using a rubber stamp with "The Toronto Club," and signing his name as secretary.

Mr. Eustace Smith, the next secretary, by arrangement with the bank to which the club's account was transferred, used a new stamp, "Pay to the order of the Dominion Bank," followed by his signature in writing; but later used a stamp which also contained his signature. He too deposited every club cheque in the Dominion Bank. The next secretary was Harbottle, who was appointed in January, 1905, and who, so far as the evidence goes, followed the practice of his predecessors in depositing all club cheques in the Dominion Bank until May, 1905, when he began to negotiate them to the defendants and other banks.

The practice of paying for meals, etc., to the steward was changed many years ago. At first members paid either in cash or by cheque. Later, no cash was received, but I.O.U.'s were given, and at the end of the month a bill was rendered, which was settled by cheque. These cheques, as above stated, were, up to May, 1905, invariably deposited with all other club cheques in the Dominion Bank to the credit of the club.

A good deal of evidence was given and some confusion created about a small sum placed in the hands of the head porter (and called the porter's bank) for the purpose of cashing small cheques for members; but that has really no bearing upon the question at issue in these cases. This money was either taken from the cash in the hands of the secretary, or was the proceeds of regular "petty cash" cheques drawn for the purpose and signed by the chairman and the secretary. Such members' cheques were handed to the secretary and by him deposited in the bank in the regular way. The only cheques in favour of the club which were not deposited to its credit in the club's bank during the whole twenty-seven years from 1878 to May, 1905, appear to have been those already mentioned that were made out in the time of Mr. Ogden, by mistake, in favour of the club, instead of the steward, who was then the caterer and entitled to the dining-room receipts. These Mr. Ogden indorsed over to



the steward; but there is no evidence that any officer or any of the defendants was aware of this, and I do not see that it can have any relevancy to the questions arising in these cases.

Great stress has been laid upon the fact that the later secretaries did not receive special instructions as to indorsing and depositing all cheques, and were not advised of restrictions upon them regarding these. To my mind, the explanation is quite simple. They had all been members of the club before their appointment, and were aware of the practice of their predecessors, and could learn from the stamps and books how the work was done; and, as said by one of them, he "knew there was only one way," and he got it from "a knowledge of business." They all knew, as any business man would know, that the proper destination of all such cheques was the bank of the club; and that all payments were to be by cheque signed and countersigned. The mode of business was simplicity itself, and I fail to see where the "large financial control" of the secretary comes in, or what bearing his being "practically the manager of the club," and his being "put forward as the person to manage its business," can have upon the issues in these cases.

To sum up, I find no authority in any secretary to indorse generally. I find specific instructions by the committee to Ogden to indorse for deposit in the bank of the club only; instructions known to and followed by Forlong, his assistant and successor; a practice well known to and followed invariably by their successors, as to the delivery and deposit, up to May, 1905, and with few and immaterial variations as to the form of signature by the latter.

On another ground, I think the defendants must fail. All the cheques in question being signed by Harbottle by procuration, the onus was upon the defendants to prove his authority to indorse, and not, as put in the judgment below, upon the plaintiff to prove that there were restrictions placed upon him. There was no holding out by the club that he had such power, and no knowledge that he was exercising it; and none of the defendants made any inquiry as to his powers or authority. All that any of them knew was, that he was the secretary of the club; and they relied upon his respectability and supposed honesty. As

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appears from the authorities already quoted, this was not sufficient to justify his action or their confidence; and they should bear the responsibility of it.

In addition to this, the very form of these cheques was such as to suggest and indicate, not only that they were the property of the club, and should be collected in the ordinary course, by its bank, but that any other treatment of them required an explanation. I think the law on this point is very concisely stated in Halsbury's Laws of England, vol. 1, sec. 1217: "Apart from a procuration signature, any indication that the customer is using for his own benefit a document *prima facie* created for the benefit of, and being the property of, another person should put the banker on inquiry." See, also, *Hannan's Lake View Central Limited v. Armstrong and Co.*, 16 Times L.R. 236, and the comments upon it in Paget's Law of Banking, 2nd ed., p. 260.

The absence of authority, or even apparent authority, is common to all three cases, although there are particulars and degrees of negligence in each that are not found in the others.

In the case of the Imperial Trusts Company, Harbottle had a small account there from 1905; but it was only in September, 1907, that he began to deposit in it these cheques belonging to the club and indorsed by himself. In September, he deposited 10 cheques, amounting to \$274.45; in October, 29 cheques, for \$1,117.60; and in November, 30 cheques, for \$1,327.40: a total of \$2,719.45. No questions were asked of him, although the large number of cheques, and the aggregate amount, and his making the property of the club over to himself, should have put them upon inquiry, upon the principle above cited.

The manager of the Dominion Bank (the club's banker) admits that the cashing of those cheques that were made payable to the order of the bank was irregular, as also the cashing of cheques over the counter at another bank than that of the club. He also admits that the cashing of cheques at the bank of the club, instead of depositing them, should only be done under special circumstances. He was told that the excuse given to his teller was, that the money was required for petty cash—

an insufficient excuse, as he himself was a member of the committee, and could have signed a cheque for that purpose along with the secretary, under the rules of the club.

The local manager of the branch of the Imperial Bank adjoining the club, where these cheques were cashed over the counter for messenger boys, did not know Harbottle by sight, and admits that the usual method of a concern that had a bank account was to deposit such cheques there, and that what was done by his bank was out of the ordinary course. He said at first that he thought his branch bank had cashed such cheques ever since it was opened in 1900; although he said later that what was done at that time was giving the club's messenger boys change for large bills; and it was not contended before us that any cheques were cashed before May, 1905. The only excuse he can suggest for the practice is, that he assumed that Harbottle had the power to indorse, and that he was aware of members' cheques having been cashed at the club (referring to the porter's bank, explained above, and which has no possible bearing upon the cashing of cheques by the bank). The teller who actually cashed the cheques was at first very positive that he had done so from the time he had gone there in July, 1904, although it is quite clear that the practice began only in May, 1905. He says that he would cash any cheque that had upon it the stamp of the club, and appeared to think that the uniform on the boys was equal to a power of attorney.

It is to be observed that there is no evidence that any officer of the club was aware, until Harbottle absconded, that he had been cashing any members' cheques or disposing of them otherwise than by depositing them to the credit of the club. Any of those who had got accommodation cheques cashed at the club supposed that they were cashed by the porter or the secretary with the money of the club and their cheques deposited to its credit in the regular way.

In my opinion, the appeals should be allowed, and the three defendants should be held liable for all the cheques received by them irregularly. As to what are called the restitution cheques, drawn by Harbottle upon his account in the Imperial Trusts Company, and deposited to the credit of the club in the Dom-

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inion Bank, while I have some doubt and hesitation, it is not strong enough to lead me to dissent from the conclusion arrived at by the learned Chancellor, that the amount of these cheques should be deducted from the amount of the cheques improperly deposited by the secretary with the company.

MEREDITH, J. A.:—The most substantial, and, in my opinion, the governing, question in these cases is entirely one of fact, namely, whether the indorsements upon the cheques in question are, or are not, the indorsements of the plaintiff—whether, in truth, its secretary, Harbottle, had authority to indorse, as he did, for it: and the defendants' cases in that respect seem to me to have been quite made out when it was shewn that, for many years past, Harbottle, and those who preceded him in the office of secretary of the plaintiff, had actually indorsed for the plaintiff all such cheques; indeed, that there was no instance to be found in which any cheque, payable to the order of the plaintiff, was indorsed in any other way; a thing quite consonant with all its financial methods and practices; indeed, there does not seem to have been any other executive officer of the plaintiff who had any concern in such things, and he was subjected only to such oversight as the auditor of the plaintiff exercised over him, an oversight of a very ineffectual character: he and he alone had control and management of all the plaintiff's money matters; a thing also quite in keeping with his admitted powers under the printed rules of the plaintiff, in these words: "All entrance fees, subscriptions, and dues shall be paid to the secretary." It is admitted that the moneys comprised in all of the cheques in question might properly have been paid to, and received by, Harbottle, in cash, or by cheques payable to bearer; and, having the right to receive them in that manner, it was but a short step in giving him power to receive the same moneys through cheques payable to the order of the plaintiff.

The result was, that the plaintiff was driven to the contention that, although Harbottle and the other secretaries had power to indorse all cheques, that power was limited to indorsements for the purpose of deposits to the credit of the plaintiff's banking account only: but that contention is far from being

proved; indeed, the most that I can say in respect of it, upon the whole evidence, is that such a limitation ought to have been imposed, but never was. The fact that that was generally done by other secretaries proves only their better business methods and their honesty: there is no evidence that any such limitation was actually imposed upon any of the secretaries.

And all of the defendants seem to me to stand upon the like footing in this respect: I can find no justification in the evidence for making fish of one and flesh of another: nothing to justify a finding, which the trial Judge was unable to make, of notice to the trust company of the misappropriation, by Harbottle, of the proceeds of the cheques, which were in effect cashed by it and the money placed to the credit of his account with it; in the many transactions daily and hourly taking place in such a company, there is neither time nor cause for suspicion and detection of the peculations of a highly trusted officer, such as Harbottle was; and, if it could be said that this company should have detected the plaintiff's highly trusted officer, how much more should it be said that the club itself should have detected him? And, beside all this, this defendant cannot be held liable on the ground of negligence: see the Bills of Exchange Act, sec. 3, and see also *London Joint Stock Bank v. Simmons*, [1892] A.C. 201, 208; and also *Ross v. Chandler*, 19 O.L.R. 584, affirmed in the Supreme Court of Canada, 45 S.C.R. 127.

I can find no sufficient reason for interfering with the judgment of the trial Judge.

The difference of opinion which has now arisen here, as to the question last dealt with by me, constrains me to add: that the Bills of Exchange Act settles beyond controversy the law that negligence, however gross, will not vitiate the transfer of these cheques; there must have been bad faith. Facts which prove negligence only are not enough, the facts proved must be enough to establish dishonesty: but, of course, the same facts may point to negligence or to bad faith, and the judges of fact must determine, where there is reasonable evidence to support either finding, which they prove: and it plainly seems to me that, in this case, they point to negligence only, if either; and, I would say, to neither. The cheques in question were indorsed by the

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plaintiff in such a manner as to make them payable to Harbottle, this defendant, or any one else; they were, according to the necessities of business, received by a subordinate clerk of this defendant—its teller—whose duties were not those of a detective, but were to see that the cheques were duly indorsed so as to transfer them to the defendant; a subordinate clerk whose duties might require him sometimes to deal with a great many cheques in a few minutes, as those who have to take their turn at a teller's wicket once in a while must know. It would be unjust, it would be cruelty, to hold such a teller dishonest for not discovering the plaintiff's trusted agent's peculations, and not charging him with theft by refusing to accept the cheques and to deposit the proceeds to the credit of his account. It is surely an extraordinary thing for the plaintiff to charge this defendant with dishonesty under these circumstances, whilst the plaintiff itself, with an hundred times greater opportunity for detecting the misdoings of its own servant, failed to do so, though its committees of management were not composed of a teller merely, but of lawyers and "financiers" of high standing and much ability, aided by an auditor. If the teller were guilty of such stupidity as evidenced dishonesty, what is to be said of these committees and the auditor? The negligence which caused the losses was very much more theirs. I can find no justification for charging this defendant with any kind of dishonesty; even if it were not the highly respectable institution which it is. What possible reason could it have for being dishonest? It was not being paid a bad debt, nor was it making anything out of the transaction; the moneys were being merely deposited there by Harbottle, and could, at any time, even the next instant, have been withdrawn by him; and, in fact, they were largely withdrawn and paid over to the plaintiff; and yet, having got them back again from this defendant, they now seek to have them doubly repaid. Double assurances from those whose own negligence caused their losses. The statute-law expressly requires honesty only, and the Courts have no right to interpose a sort of constructive dishonesty, which at most is but negligence, to defeat its plain words and good sense.

MAGEE, J.A.:—I agree with the conclusions of my brother Garrow. The facts are fully referred to in the judgments of my learned brothers, and I need not repeat them. It is not a case of disputed testimony, but rather one for considering the inferences to be drawn from undisputed evidence and the legal consequences resulting.

The secretary of the club had express authority, under the rules, to receive payment of moneys payable to the club, whether payable upon cheques or other account. The members who paid their fees or their monthly club accounts could have paid them in cash, instead of by cheque. They chose, in most cases, to pay by cheques in favour of the club. The secretary, under the rules, could have gone to the banks upon which these cheques were drawn and demanded and obtained payment of them. If, instead of doing so, he sent a messenger boy or some other employee of the club to receive the payment, and such person received the money and paid it to him, it could not for a moment, I think, be said that such person would be liable for subsequent misapplications by the secretary of the moneys so received. If, instead of sending a messenger, he chooses to ask a neighbouring shopkeeper or banker to get payment for him, and, to oblige him and save him from coming back, such neighbour chooses to pay him the money before actually collecting it, equally, I think, there would be no liability. If the cheque were dishonoured, and such obliging neighbour sought to recover the money from the club, either as indorser or as receiver of money paid, then other considerations would arise, and it might be necessary to prove authority to indorse or actual receipt of the money by the club. But here it is not a question of the liability of the club upon its indorsement. All the cheques were paid. The so-called indorsement was really an informal receipt for the money, signed by the officer who had authority to receive it, and the transactions with the Dominion Bank and the Imperial Bank were in effect no more than the use of these institutions as messengers by the secretary. The money collected by them came to the hands of the club's officer entitled to receive it, although they, at their risk perhaps for the time, paid it over before it was actually received. There, I think, ended their liability.

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In the case of the Imperial Trusts Company, this cannot be said. It was not taking the cheques merely as a messenger, but allowing them to be deposited to the credit of Harbottle, in which situation, so far as it knew or it or he intended, they might permanently remain.

I agree with my brother Garrow as to its liability, and as to its being absolved to the extent of the so-called restitution cheques.

In the result, the appeals as against the banks were dismissed, MACLAREN, J.A., dissenting; and the appeal as against the trust company allowed, MEREDITH, J.A., dissenting.

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[TEETZEL, J.]

CARTWRIGHT V. WHARTON.

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Jan. 4.

*Copyright—Infringement—Law List—System of Indexing—Lists of Names in Part Copied—Submission for Alteration—Admission—Common Errors—Impossibility of Separating Pirated Parts—Injunction—Damages.*

Copyright does not extend to ideas, or schemes, or systems, or methods, but is confined to their expression; and, if their expression is not copied, the copyright is not infringed.

*Hollinrake v. Truswell*, [1894] 3 Ch. 420, 427, followed.

And where the defendant adopted in his "Canada Legal Directory, 1911," the system of indexing by numbers the Toronto agents of Ontario solicitors, used by the plaintiff in his "Canada Law List (Hardy's), 1910," but did not use the same numbers, it was *held*, that he had not infringed.

But where the defendant had, in the preparation of the lists of barristers and solicitors and of Judges and Court officials, for the purpose of getting his original information and for the preparation of lists for the printer, copied from the plaintiff's book substantially all the names found therein, although he had submitted his lists for correction and addition to the officials, and sent "correction slips" to the barristers and solicitors—the copying being shewn by his own admission and by common errors in the two publications—it was *held*, that he had infringed.

And *held*, also, that, although the defendant had, in the lists contained in his book, inserted a considerable amount of original information, it was not practicable, upon the evidence, to separate it from the pirated matter so as to leave the original material of any value or use for publication; and, therefore, the plaintiff was entitled to damages and to have the defendant enjoined from further printing, publishing, or selling the "Canada Legal Directory, 1911," or any reprint or future edition thereof, containing any of the lists of barristers and solicitors and of Judges and Court officials therein contained.

Review of the authorities.

*Mawman v. Tegg* (1826), 2 Russ. 385, 390, 391, specially referred to.

ACTION for damages and an injunction for the alleged infringement by the defendant of the plaintiff's copyright, under the Dominion Copyright Act, in the Canadian Law List (Hardy's), 1910.

November 1, 2, 3, and 9, 1911. The action was tried before TEETZEL, J., without a jury, at Toronto.

*J. H. Moss*, K.C., for the plaintiff.

*D. T. Symons*, K.C., for the defendant.

January 4, 1912. TEETZEL, J.:—The plaintiff and defendant had for some years been in partnership, and had published a number of former editions of the Law List, and were joint owners of the copyright. The partnership was dissolved early

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in August, 1910, and the plaintiff purchased the defendant's interest in the copyright. By the terms of the agreement of dissolution, the defendant was expressly permitted to engage in a rival business, and he immediately began preparations to publish another Law List for 1911, which was published in February, 1911, and is called "The Canada Legal Directory, 1911;" and the plaintiff charges that this publication constitutes an infringement of his copyright in the 1910 edition of his Law List.

The particulars of the charge chiefly relied upon are:—

(1) The system of indexing the Toronto agents of Ontario solicitors in use in the plaintiff's publication has been copied in the defendant's publication from the plaintiff's publication.

(2) All that part of the defendant's publication which consists of lists and tables of Courts, Judges, Court and other legal officials, barristers and solicitors, is copied, either directly or indirectly, from the plaintiff's publication.

As to the first particular, it is not disputed that the defendant in his book has adopted the system used by the plaintiff to indicate the Toronto agent of each solicitor in the Ontario list who has a Toronto agent, which is, by placing a number to the right of the name of such solicitor, which corresponds with the number to the left of the name of another solicitor or firm appearing in the list for Toronto; but, while the defendant had adopted this system, he has not used the numbers appearing in the plaintiff's book.

If the plaintiff's case depended solely upon this charge, I think his action would fail, because, as held by Lindley, L.J., in *Hollinrake v. Truswell*, [1894] 3 Ch. 420, at p. 427, copyright does not extend to ideas, or schemes, or systems, or methods, but is confined to their expression; and, if their expression is not copied, the copyright is not infringed. As illustrating this, the learned Lord Justice refers to *Baker v. Selden* (1879), 101 U. S. (11 Otto) 99, wherein it was held that the author of a system of bookkeeping was not entitled to any monopoly in the system, but was only entitled to prevent other persons from copying his description of it.

As to the second particular of charge, a comparison of the two publications discloses a strikingly similar arrangement of

the lists of barristers, solicitors, and Court officials. The presence in the defendant's publication of a large number of common errors in spelling and in alphabetical sequence of names in the lists forcibly suggests that the defendant's lists, where these common errors appear, were copied from the plaintiff's lists.

It is laid down in many authorities that the presence of common errors is one of the surest tests of copying: *Kelly v. Morris* (1866), L.R. 1 Eq. 697; *Pike v. Nicholas* (1869), L.R. 5 Ch. 251; *Cox v. Land and Water Journal Co.* (1869), L.R. 9 Eq. 324.

In *Murray v. Bogue* (1852), 1 Drew. 353, where instances were stated in the bill and at the Bar in which the defendant had the plaintiff's errors, Vice-Chancellor Kindersley said (p. 367): "Now, the use of shewing the same errors in both is, that where the defendant says he has got his information, not from the plaintiff, but from some other sources, if the evidence is unsatisfactory on the question, whether the defendant did use the plaintiff's work or not, to shew the same errors in the subsequent work that are contained in the original, is a strong argument to shew copying." See also Copinger on Copyright, 4th ed., p. 171.

The plaintiff, however, is not in this case driven to depend solely on the evidence of common errors, because, while the defendant says he got much of his material from other sources—and no doubt he did—he admits that he got much of it from the plaintiff's publication. He says that the first thing he did in preparing his material was to send to each barrister and solicitor in the Dominion what he called a correction slip, which contains the solicitor's name, and, in the case of a firm, the name of each member. With each slip was sent a circular stating that the defendant was preparing an improved Law List for 1911, and requesting the person to whom it was sent to return the slip with any suggested corrections. The defendant took the names of most, if not all, of those to whom he sent these correction slips from the plaintiff's publication. Many, but not nearly all, of these correction slips were returned to the defendant in due course. From these and from the plaintiff's lists, which he also used for that purpose, he prepared for the Regis-

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trar or other official of the Court at the county town of each county in the Dominion a list of the barristers and solicitors in that county, requesting the official to correct the list and return it to him with any alterations in or additions thereto.

These several lists, when returned, were used as the basis for completing the lists for the respective provinces as they appear in the defendant's publication.

With regard to the lists of Court officials contained in the defendant's book, it clearly appears, with reference to Nova Scotia and New Brunswick, that the defendant copied all the material which appeared in those lists from the plaintiff's book and sent the same to the proper Court official for revision and correction, and for the addition of some other information not appearing in the plaintiff's book.

While the evidence is not so satisfactory as to other provinces, I think the fair inference is, that a similar practice was adopted as to them.

As to the list of officials at Osgoode Hall, this inference is strongly supported by the presence of two striking errors, one in the spelling of the Christian name of a Chief Justice, and the other in the initial of an official, which are common to both the plaintiff's and the defendant's list.

I, therefore, find as a fact that, both in the preparation of the lists of barristers and solicitors throughout the Dominion, and of the Judges and Court officials, the defendant, for the purpose of getting his original information and for the preparation of the lists for the printer, copied from the plaintiff's book substantially all the names found in the plaintiff's book.

I also find that the defendant, as the result of independent efforts and inquiry, collected many additional names and much material and information of value for a Law List; and I also find that, while the defendant adopted much of the method of arrangement of the material, he also adopted many changes in the arrangement which may be claimed to be improvements on the plaintiff's methods.

The defendant's summary of the Laws of the Provinces is the result of independent effort, which, with much other information in his book, has not infringed upon the plaintiff's rights.

I think, however, that, under the authorities, it must be adjudged that the defendant has, in respect of the lists of barristers and solicitors and Judges and Court officials, substantially availed himself of the labour of the plaintiff, and has been guilty of an infringement of the plaintiff's copyright, being his exclusive right, under the law, of printing or otherwise multiplying copies of his original work, as contained in his Law List of 1910.

There was, of course, nothing to prevent the defendant preparing a rival Law List, provided the material collected for the same was the product of his own original effort, or was obtained from sources not copyrighted.

It is not necessary for me to decide whether the defendant would have escaped liability in respect of the barristers and solicitors' lists, if he had got replies from all the persons to whom he sent correction slips; because, in very many cases, he did not get replies, and in those cases he copied the names as he found them in the plaintiff's lists, after revision by the local Court officials.

*Garland v. Gemmill* (1887), 14 S.C.R. 321, was a case of piracy of contents of the Parliamentary Companion, and it was held that the publisher of a work containing biographical sketches cannot copy them from a copyrighted work, even where he has applied to the subjects of such sketches and been referred to the copyrighted work therefor; and that in works of this nature, where so much must be taken by different publishers from common sources, and the information given must be in the same words, the Courts will be careful not to restrict the right of one publisher to publish a work similar to that of another, if he obtains the information from common sources, and does not, to save himself labour, merely copy from the work of the other that which has been the result of the latter's skill and diligence.

Nor is it necessary to decide what would have been the consequence if the defendant had got the original information from the local Registrars as to the Judges and Court officials, if it had chanced to have been the same as appeared in the plaintiff's lists; because the defendant admits that in two cases, at least,

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he copied the material out of the plaintiff's book, and submitted it to the Local Registrars for revision and correction, and thus appropriated to himself the results of the plaintiff's diligence and labour.

In *Lewis v. Fullarton* (1839), 2 Beav. 6, at p. 8, Lord Langdale, M.R., said: "Any man is entitled to write and publish a topographical dictionary, and to avail himself of the labours of all former writers whose works are not subject to copyright, and of all public sources of information; but, whilst all are entitled to resort to common sources of information, none are entitled to save themselves trouble and expense by availing themselves, for their own profit, of other men's works still subject to copyright and entitled to protection."

In *Hotten v. Arthur* (1863), 1 H. & M. 603, Page Wood, V.-C., said (p. 609): "The only fair use you can make of the work of another of this kind" (descriptive catalogue) "is where you take a number of such works: catalogues, dictionaries, digests, etc., and look over them all and then compile an original work of your own, founded on the information you have extracted from each and all of them; but it is of vital importance that such new work shall have no mere copying, no merely colourable alterations, no blind repetition of obvious errors."

In *Kelly v. Morris*, L.R. 1 Eq. 697, which was a directory case, the same learned Judge says (p. 701): "In the case of a dictionary, map, guide-book, or directory, when there are certain common objects of information which must, if described correctly, be described in the same words, a subsequent compiler is bound to set about doing for himself that which the first compiler has done. In case of a road-book, he must count the milestones for himself. In the case of a map of a newly-discovered island . . . he must go through the whole process of triangulation just as if he had never seen any former map; and, generally, he is not entitled to take one word of the information previously published without independently working out the matter for himself, so as to arrive at the same result from the same common sources of information, and the only use he can legitimately make of a previous publication is to verify his own calculations and results when obtained. So in the present case the defendant could not take a single line of the plaintiff's direc-

tory for the purpose of saving himself labour and trouble in getting his information. . . . What he has done has been just to copy the plaintiff's book and then to send out canvassers to see if the information so copied was correct. . . . The work of the defendant has clearly not been compiled by the legitimate application of independent personal labour."

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And in *Scott v. Stanford* (1867), L.R. 3 Eq. 718, the same learned Judge says (p. 724): "The defendant, after collecting the information for himself, might have checked his results by the plaintiff's tables, but that is a widely different thing from this wholesale extraction of the vital part of his work. No man is entitled to avail himself of the previous labours of another for the purpose of conveying to the public the same information, although he may append additional information to that already published."

In *Morris v. Ashbee* (1868), L.R. 7 Eq. 34, Giffard, V.-C., says (p. 41): "It is plain that it could not be lawful for the defendants simply to cut the slips which they have cut from the plaintiff's directory and insert them in theirs. Can it be lawful to do so because, in addition to doing this, they sent persons with the slips to ascertain their correctness? I say, clearly not. Then, again, would their acts be rendered lawful because they got payment and authority for the insertion of the names from each individual whose name appeared in the slips? And to this I again answer, clearly not. . . . They had no right to make the results arrived at by the plaintiff the foundation of their work or any material part of it, and this they have done."

See, also, *Morris v. Wright* (1870), L.R. 5 Ch. 279.

In referring to the above cases, Sir Charles Hall, V.-C., in *Hogg v. Scott* (1874), L.R. 18 Eq. 444, at p. 458, says: "The true principle in all these cases is, that the defendant is not at liberty to use or avail himself of the labour which the plaintiff has been at for the purpose of producing his work—that is, in fact, merely to take away the result of another man's labour, or, in other words, his property."

In my opinion, the evidence here clearly brings this case within that principle; and, although the defendant has, in the lists contained in his book, inserted a considerable amount of

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original information which probably does not infringe on the plaintiff's right, it is not practicable, upon the evidence, to separate it from the pirated matter so as to leave the original material of any value or use for publication.

Upon this aspect of the case I adopt, as strikingly applicable, the terse language of Lord Eldon in *Mawman v. Tegg* (1826), 2 Russ. 385, at pp. 390-1: "As to the hard consequences which would follow from granting an injunction, when a very large proportion of the work is unquestionably original, I can only say, that, if the parts which have been copied cannot be separated from those which are original, without destroying the use and value of the original matter, he who has made an improper use of that which did not belong to him must suffer the consequences of so doing. If a man mixes what belongs to him with what belongs to me, and the mixture be forbidden by the law, he must again separate them, and he must bear all the mischief and loss which the separation may occasion. If an individual chooses in any work to mix my literary matter with his own, he must be restrained from publishing the literary matter which belongs to me; and if the parts of the work cannot be separated, and if by that means the injunction, which restrained the publication of my literary matter, prevents also the publication of his own literary matter, he has only himself to blame."

I think, therefore, the proper judgment to be entered is, that the defendant's publication known as the "Canada Legal Directory, 1911," is, in respect of the lists of barristers and solicitors and of Judges and Court officials therein contained, an infringement of the plaintiff's copyright in respect of the Canadian Law List, 1910; and that the defendant be restrained from further printing, publishing, or selling the said "Canada Legal Directory, 1911," or any reprint or future edition thereof, containing any of the said lists; and that it be referred to the Master in Ordinary to ascertain the plaintiff's damages; and that the defendant pay to the plaintiff the costs of action up to and including this judgment; costs of reference and further directions reserved until after the Master's report.



[RIDDELL, J.]

## THOMSON v. PLAYFAIR.

1912

Jan. 6.

*Contract—Sale of Timber—Interest in Land—Statute of Frauds—Document Signed by Servant of Purchasers—Absence of Authority as Agent—Knowledge of Principal—Adoption of Contract—Insufficiency of Memorandum to Satisfy Statute—Part Performance—Taking Possession—R.S.O. 1897, ch. 32, sec. 3 (1), (3)—Liability of Agent—Misrepresentation of Authority—Vendor not Misled—Costs—Misconduct.*

The plaintiff, having a right from the Crown to remove all the timber upon an island, made a sale of it to the defendant firm, through two foremen who acted for the firm in buying and shipping ties. The plaintiff's brother and agent signed a receipt for \$100 as received from the firm, "being part payment on purchase of timber on Yeo Island"—mentioning the purchase-price, and that the balance was to be paid within a month. A copy was made of the receipt, and the defendant B., one of the two foremen, signed it by the name of the firm, "per C. E. B." The \$100 was paid by a draft on the firm by B., explicitly "on account of purchase of Yeo Island." The firm paid the draft, but afterwards set up that it was for an option on the timber:—

*Held*, that what was sold was an interest in land within the meaning of the Statute of Frauds.

*Hoeffler v. Irwin* (1904), 8 O.L.R. 740, followed.

2. On the evidence, that neither the defendant B. nor the other foreman had authority either to buy the timber or to sign a contract for the purchase.
3. That the defendant firm knew that B. had bought for them—and not simply taken an option; and, knowing this, they did not repudiate the agency or the contract, and must be regarded as having adopted the contract: they were in the position of having bought the timber, paid \$100 on the purchase, and signed a copy of the receipt given them by the plaintiff's agent; but this, the only document (except the draft) signed by or for them, was defective to charge them, the Statute of Frauds being pleaded.
4. That, having regard to the rights conferred upon a timber licensee by R.S.O. 1897, ch. 32, sec. 3 (1) and (3), the acts of the agents of the defendant firm, going to and landing upon the island, examining the timber, etc., amounted to a taking possession of the land, and a part performance which satisfied the statute.
5. That the action should not have been brought against B., as on an implied warranty of authority to make the contract and sign the document evidencing it, for his co-defendants; for B. told the plaintiff's agent that he did not know that he had any power to give him a contract—the plaintiff's agent was not in fact misled.
- Polhill v. Walter* (1832), 3 B. & Ad. 114, distinguished.
6. That, though the action was dismissed as against B., it should be without costs, on account of misconduct.

ACTION for specific performance by the defendants Playfair and White of an alleged contract to purchase from the plaintiff the timber upon Yeo Island, Manitoulin district, or, in the alternative, for damages from the defendant Byers for misrepresentation of authority to bind his co-defendants.

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December 21, 1911. The action was tried before RIDDELL, J., without a jury, at Toronto.

*D. Robertson*, K.C., for the plaintiff.

*R. McKay*, K.C., for the defendants Playfair and White.

*O. E. Klein*, for the defendant Byers.

January 6, 1912. RIDDELL, J.:—The plaintiff had from the Crown the right to remove all the timber from Yeo Island; her brother and agent, W. A. Thomson, was trying to dispose of it. After some dickering, unnecessary here to consider, he made a sale to Playfair and White, a firm in a large way of business, through their agents Thompson and Byers. Thompson acted as a sort of foreman in buying ties, etc., and Byers in shipping them; but I cannot find that either had the right to enter into such a contract as this. Thomson gave Byers a receipt in the following form:—

“Playfair & White

“Dealers in Ties, Posts, Cedar Squares, etc.

“Wiarthon Branch, C. E. Byers, Agent.

“Wiarthon, Ontario, May 22nd, 1911.

“Received from Playfair & White the sum of one hundred dollars, being part payment on purchase of timber on Yeo Island. The purchase-price of said timber to be five thousand five hundred dollars. Balance of this amount to be paid within one month.

“Catharine Thomson,

“Per Alex. Thomson.”

At the same time a copy was made of this receipt (excepting the signature), and Byers signed it thus:—

“Playfair & White,

“Per C. E. Byers.”

This was marked “copy of receipt,” and handed to Thomson—Byers telling him that he did not “know as he had any right to give him an agreement.”

The \$100 was paid by a draft on Playfair and White by Byers, explicitly “on account of purchase of Yeo Island.”

The receipt signed by Thomson was sent by Byers, on the 24th May, to the defendant firm at Midland, in a letter: “Yeo Island. Mr. Thompson and I tried to get you by 'phone on

Monday, but they said you and Mr. White were both out of town, so we have closed for the Island, at least we have bound the bargain." This was received by Playfair and laid by him with the receipt on White's desk for his attention on his return home.

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On the 2nd June, an entry is made in the firm's books thus:—

June 2. Yeo Island.....	100.00
To Playfair & White on a/c	
purchase Yeo Island Miss	
Catharine Thomson .....	100.00
(on T. folio 5).	

In the tie-book ledger an account had already been opened with Yeo Island, and the full account stood at the time of the trial:—

1911.	Yeo Island.	Dr.	Cr.
May 20 To Sundries .....	493	22.00	
June 2 Order to Miss Thomson a/c			
of Island .....	5	100.00	
July 13 Ex. C. E. Byers			
Sept. 1/30 To Island with tug.....	31	18.00	
To Tug to Island.....	50	6.00	

Playfair & White say that they looked upon the transaction as a mere option, and not a purchase—that they, as a matter of business, open account with any intended purchase; and this last statement is perfectly intelligible and good business method.

On the 31st May, the firm write Byers: "Am pleased that you have secured Yeo Island, and trust it will turn out a good one for cedar. You might send me an estimate of what you found on it, so I can figure it out." This was written by Playfair—White being away in the south.

On the 5th June, Byers sends his estimate.

On the 16th June, Thompson writes Thomson: "I will have to ask you for another thirty days option on Yeo Island, as the other parties are not satisfied without seeing more of it . . . so if you will give us another thirty days on it, I think it will be all right. If you cannot give this thirty days we will have to throw up the option."

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Thomson thereupon wrote the firm on the 20th June: "Replying to your letter of sixteenth inst., consider contract of sale of lumber on Yeo Island to you closed. I gave no option. Will wait two weeks for payment of balance, if you request."

On the 26th June, Byers writes Thomson asking how many acres "they are" in Yeo Island, "as I am going up to see it myself, and I want to get away as soon as I can." Thomson replies, on the 19th July, insisting on the sale having been made—and threatening suit. Byers went up and examined the Island; and that is what the subsequent entries in the ledger account in the tie-book refer to. He reported to his principals favourably.

On the 22nd August, suit is threatened by the solicitors, and action brought two weeks thereafter, against the firm and Byers. The firm set up a general denial; that Byers had no authority to enter into such a contract for them; and the Statute of Frauds. Byers says that he is only an agent; that Thompson agreed with Thomson to buy the timber on Yeo Island for \$5,500—\$100 down and \$5,400 in one month—and that, on Thompson's instructions, he gave the draft as the firm's agent, and had drawn up "as evidence of sale and purchase of said timber the papers or documents . . . set out in the . . . statement of claim."

At the trial, he changed his story and set up an option. I entirely discredit this story, and think that he was telling the truth when he gave instructions for the defence.

I am much obliged to counsel for the very able arguments presented for all parties—and now proceed to dispose of the case.

The first question is, "Does the Statute of Frauds apply to the sale of such property as is the subject-matter of the present action?"

Whatever might have been the answer, were the question an open one—I think that I am bound by authority in our own Courts to hold that what was sold was an interest in land within the meaning of the Statute of Frauds.

Much ingenious distinction is to be found in the older cases,

but I do not think any reasonable doubt can exist since the case in the Court of Appeal of *Hoeffler v. Irwin* (1904), 8 O.L.R. 740.

*Webber v. Lee* (1882), 9 Q.B.D. 315, is a less strong case—and I do not discuss the cases in the English Courts or our own before *Hoeffler v. Irwin*, by which I am bound.

The fact that the document relied upon is not signed by those attempted to be charged is immaterial, if it be signed by an agent with authority—and it is of no importance that the name of the principal does not appear (at least in a document not under seal). See the cases collected in *Standard Realty Co. v. Nicholson* (1911), 24 O.L.R. 46.

I have found as a fact that neither Thompson nor Byers had any authority either to buy the timber or to sign a contract for the purchase.

The plaintiff contends, however, that their act was ratified by Playfair and White.

I have since the trial given the case great consideration, and cannot change the view, taken at the trial, that these defendants knew that Byers had bought for them—and not simply taken an option. The statement in the letter of the 24th May, I think, did not in fact give them a different impression—"We have closed for the Island, at least we have bound the bargain." The answer of the 31st May, already cited, also is significant.

Knowing that their ostensible agent had bought the timber, they did not repudiate the agency or the contract, as they should have done if they did not intend to adopt the contract.

I think that they did adopt the contract, whatever it was.

Then they are in the position of having bought the timber, paid \$100 on the purchase, and signed a copy of the receipt given them by the agent of the plaintiff.

This is the only document signed by them or for them, except indeed the draft for \$100 given to the plaintiff; and I am of opinion that it is defective to charge them, when the Statute of Frauds is pleaded.

Nor, as at present advised (but I give no decision on this point), do I think that the rule in *Rochefoucauld v. Boustead*, [1897] 1 Ch. 196, referred to and followed in *Kendrick v.*

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*Barkey* (1907), 9 O.W.R. 356, can be appealed to. It is the simple case of one contracting party setting up the statute to defeat an action on a contract not properly verified as the statute requires—the defendants had received no property, etc., under the contract.

But the action of the defendants' agents going to and landing upon the island, examining the timber, etc., are acts which are claimed to be acts of part performance—of course the part payment is not.

The Act R.S.O. 1897, ch. 32, gives the licensee the right, not only to the timber, but also (sec. 3 (1)) "to take and keep exclusive possession of the lands," and (sec. 3 (3)) "to institute any action against any . . . trespasser." If the defendants had not bought the property from the plaintiff, they had no right to send their agent upon the island as they did—their act was a taking possession of the land, and, in my view, an act of part performance: *Fry on Specific Performance*, sec. 264 *sqq.*

There will be judgment for the plaintiff against these defendants for \$5,000, interest thereon from the 22nd June, 1911, and full costs of suit.

As to Byers, the action should not have been brought against him at all.

The theory of the plaintiff is, that she has an action against Byers as on an implied warranty of authority to make the contract and sign the document evidencing it for his co-defendants. The rule is: "Where an agent assumes an authority which he does not possess and induces another to deal with him upon the faith that he has the authority he assumes, it must be taken that the person making the claim of agency undertook that he was agent and he is liable personally for the damage that has occurred:" *Firbank's Executors v. Humphreys* (1886), 18 Q.B.D. 54; *Oliver v. Bank of England*, [1901] 1 Ch. 652, [1902] 1 Ch. 610; *Starkey v. Bank of England*, [1903] A.C. 114. And it makes no difference that the claim is made *bonâ fide*, and there is no fraud. But this is not the case where there is no misrepresentation of fact: *Jones v. Hope* (1880), 3 Times L.R. 247*n* (C.A.)

Here Byers told the plaintiff's agent that he did not know that he had any power to give him a contract—the vendor's

agent was not in fact misled, but took the document with Byers's signature for what it was worth.

The case relied upon by the plaintiff's counsel is distinguishable—*Polhill v. Walter* (1832), 3 B. & Ad. 114. There the defendant, who had formerly been in partnership with H., had an office which H. also still continued to occupy in part. A bank clerk called with a draft on H.; H. was out of town, and the defendant asked for a few days' delay. This was refused; and one A. (one of the payees) assured the defendant that "it was all correct"—the defendant acted upon the assurance and accepted per proc. of H.—the payees indorsed it over to the plaintiff. H. refused to pay; the plaintiff sued him, and was nonsuited; whereupon he sued the defendant. The jury negatived fraud, and Lord Tenterden dismissed the action. On appeal, it was held that the indorsement per proc. was a representation to all who should thereafter be the holders of the bill that the defendant had the authority to accept for H., and judgment was entered for the plaintiff. There the plaintiff was misled; in the present case she was not.

The action will be dismissed as against Byers. Had his conduct been throughout as impeccable as in the signing of the document, etc., he should have his costs; but it is impossible not to recognise that he has allowed his desire to shield his employers to modify his views of the transaction in question. He stated substantially the facts to his solicitor, and his solicitor put them in formal shape in the pleadings; but subsequently Byers completely changed his recollection of the facts—it is possible not corruptly.

There will be no costs *quoad* this claim.

The delay in giving judgment is due to the fact that counsel asked for and obtained permission to put in authorities—these have reached me just this week.

Full credence is to be given to the plaintiff's agent, Thomson.

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*Railway—Injury to Passengers' Baggage Lying at Station—Passengers not Travelling by Same Train—Liability of Railway Company—Gratuitous Bailees—Gross Negligence—Bailees for Reward—Warehousemen—Accident not Caused by Negligence—Onus—Evidence.*

Where passengers by railway checked their baggage on the day on which they purchased their tickets, but (without the knowledge or fault of the railway company) did not begin their journey until the following day, and their baggage reached their destination before them, and was injured, by an accidental explosion, while in the baggage-room of the railway company, it was *held*, that the liability of the company was that of gratuitous bailees, i.e., for gross negligence only.

Definition of "gross negligence."

Review of the authorities.

And *held*, upon the evidence, that the company were not guilty of gross negligence.

*Semble*, also, that the company, if they were to be considered as bailees for reward—warehousemen—were not liable: they had discharged the onus of proving that the explosion was not due to negligence.

ACTION by husband and wife for the value of a trunk and contents destroyed in the baggage-room of the defendants at St. Catharines.

September 18, 1911. The trial of the action was begun before RIDDELL, J., without a jury, at St. Catharines. Further evidence was afterwards taken, and written arguments were furnished by counsel.

*H. H. Collier*, K.C., for the plaintiffs.

*W. E. Foster*, for the defendants.

January 8, 1912. RIDDELL, J.:—The following are the facts. The plaintiffs purchased from the New York Central and Hudson River Railroad Company, at New York, on the 23rd December, 1910, through tickets from New York to St. Catharines, Ontario, *viâ* the Grand Trunk Railway, and on that day checked the baggage in question in this action. The baggage reached St. Catharines the following day, the 24th December, at 2.47 p.m. The plaintiffs did not, however, commence their journey from New York until the next day after they had checked the baggage, that is, the 24th; they reached St. Catharines on Christmas



morning (the 25th December), at 10 a.m. The baggage, on arrival at St. Catharines, was placed in the baggage-room there, and on the 25th December, at about 5 a.m., there was an explosion in the baggage-room (two sections of the defendants' hot water heater or boiler, situated therein, giving way), causing damage to the plaintiffs' trunk and contents. The total value of trunk and contents has been agreed on at \$800.

The tickets contained, printed on their face, a number of conditions, amongst them, condition 5: "Baggage liability is limited to wearing apparel not to exceed \$100 in value for a whole ticket and \$50 for a half ticket, unless a greater value is declared by the owner and excess charge thereon paid at the time of taking passage."

One of the conditions indorsed on the baggage check is: "Baggage consists of passenger's wearing apparel, and liability is limited to \$100 (except a greater or less amount is provided in tariffs) on full fare ticket, unless a greater value is declared by owner at time of checking and payment is made therefor."

There is no pretence that any greater value was declared by the owner at the time of checking, or that any payment was made therefor.

The defendants contend that they held the baggage as bailees, and at the strongest as against them simply as warehousemen, and that they were not negligent, and therefore not liable to the plaintiffs, or, if held to be liable, they are only liable under the terms or conditions indorsed on the tickets and baggage check for \$100, and have so pleaded.

While I do not understand the plaintiffs at the trial to have expressly abandoned a claim against the defendants as common carriers, this was not pressed at the trial—and in the written argument counsel says: "It must be presumed that the railway company held the baggage after 9 p.m. of Saturday as warehousemen, and the defendant company would, therefore, only be liable for negligence"—thereby conceding that no claim lay against the defendants as common carriers.

Such cases as *Penton v. Grand Trunk R.W. Co.* (1869), 28

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U.C.R. 367, and *Vineberg v. Grand Trunk R.W. Co.* (1886), 13 A.R. 93, shew that counsel was wise in making this concession. It remains to consider whether the defendants are liable otherwise than as common carriers.

Early in the history of railways, it was laid down by the Massachusetts Courts that baggage is supposed to travel by the same train as the passenger, and that, if the passenger fails (without the fault or to the knowledge of the railway company) to travel by the same train, the liability of the railway company is but for gross negligence. *Collins v. Boston and Maine R.R. Co.* (1852), 10 Cush. 506, is one of such cases. *Wilson v. Grand Trunk R.W. Co.* (1868), 56 Me. 60: "It is implied in the contract that the baggage and the passenger go together." *Marshall v. Pontiac Oxford and Northern R.R. Co.* (1901), 126 Mich. 45: "Baggage implies a passenger who intends to go upon the train with his baggage, and receive it upon the arrival of the train at the end of the journey. . . . If he (the plaintiff) had sold the ticket . . . to another passenger, he would stand in no different light from that in which he does now. . . . The defendant was not in fault in checking the baggage. Its agent, the baggage master, was justified in assuming that the plaintiff intended to accompany his baggage upon the next train." The judgment says that it may not be "absolutely necessary for the passenger to go upon the same train with his baggage in order to entitle him to have his baggage taken care of at his destination by the railroad company as a warehouseman. Where the passenger purchased his ticket with the *bonâ fide* intention to use it, but, without fault upon his part, did not accompany it, but went on a following train, a different case is presented."

*Wood v. Maine Central R.R. Co.* (1903), 98 Me. 98: "The relation of passenger and public carrier . . . entitles the passenger to have his personal baggage transported at the same time without any additional charge for the freight. . . . But in the absence of any special agreement therefor the carrier does not incur . . . liability as an insurer of the baggage, unless the passenger accompanies it in its transportation or is prevented from doing so by the fault of the carrier. . . . Where the owner did not intend to accompany his baggage . . . and . . . did not in fact . . . the defendant was only liable

as a gratuitous bailee. . . *Wilson v. Grand Trunk R.W. Co.* (1868-9), 56 Me. 60, 57 Me. 138; *Graffam v. Boston and Maine R.R. Co.* (1877), 67 Me. 234." In the *Wood* case, the trunk was received at Wiscasset, not accompanied by the owner; it was placed in the railroad company's baggage-room at Wiscasset; that room was broken open and entered by thieves, and the contents of the trunk stolen. The Court, holding that the liability of the railroad company was as of a gratuitous bailee, and that there was no such negligence as would render the company liable as a gratuitous bailee, the action was dismissed.

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*Cutler v. North London R.W. Co.* (1887), 19 Q.B.D. 64, cannot be said to decide anything on this point, although the judgment of A. L. Smith, J., p. 67, is suggestive.

There being nothing to take the case out of the general rule, I think the defendants' liability, if any, is that of a gratuitous bailee—then they are liable only for "gross negligence." What "gross negligence" is, has been the subject of much judicial and editorial discussion.

Rolfe, B. (afterwards Lord Cranworth, L.C.), in *Wilson v. Brett* (1843), 11 M. & W. 113, pp. 115, 116, "could see no difference between *negligence* and *gross negligence*—that it was the same thing, with the addition of a vituperative epithet;" and Willes, J., in *Grill v. General Iron Screw Collier Co.* (1866), L.R. 1 C.P. 600, at p. 612, quite agreed with this dictum.

Taunton, J., in *Doorman v. Jenkins* (1834), 2 A. & E. 256, at pp. 261, 262, says: "The phrase 'gross negligence' means nothing more than a great and aggravated degree of negligence, as distinguished from negligence of a lower degree."

Parke, B., in *Wyld v. Pickford* (1841), 8 M. & W. 443, at p. 460, says that in some of the cases the term has been defined in such a way as to mean ordinary negligence, that is, the want of such care as a prudent man would take of his own property; and cites Best, J., in *Batson v. Donovan* (1820), 4 B. & Ald. 21, 30, and Dallas, C.J., in *Duff v. Budd* (1822), 3 Brod. & B. 177, 182; Story on Bailments, sec. 11.

Lord Denman, C.J., giving the judgment of the Court in *Hinton v. Dibbin* (1842), 2 Q.B. 646, at p. 661, says: "It may

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well be doubted whether between 'gross negligence' and 'negligence' merely any intelligible distinction exists."

This language is quoted by Cresswell, J., delivering the judgment of the Court in *Austin v. Manchester Sheffield and Lincolnshire R.W. Co.* (1850), 10 C.B. 454, at pp. 474, 475, and he says: "It is manifest that no uniform meaning has been ascribed to those words" (gross negligence), "which are more correctly used in describing the sort of negligence for which a gratuitous bailee is responsible, and have been somewhat loosely used with reference to carriers for hire."

Erle, J., in *Cashill v. Wright* (1856), 6 E. & B. 891, at p. 899 says: "The legal meaning of gross negligence is greater negligence than the absence of . . . ordinary care."

Pollock, C.B., in *Beal v. South Devon R.W. Co.* (1860), 5 H. & N. 875, at p. 881, says: "There is a certain degree of negligence to which every one attaches great blame. It is a mistake to suppose that things are not different because a strict line of demarcation cannot be drawn between them." And in this suggested definition agreed Crompton, J., giving the judgment of the Exchequer Chamber in the same case (1864), 3 H. & C. 337, at pp. 341, 342.

In *Lord v. Midland R.W. Co.* (1867), L.R. 2 C.P. 339, Willes, J., said (p. 344): "Any negligence is *gross* in one who undertakes a duty, and fails to perform it. The term 'gross negligence' is applied to the case of a gratuitous bailee, who is not liable unless he fails to exercise the degree of skill which he possesses."

The leading case for any Canadian Court is *Giblin v. McMullen* (1868), L.R. 2 P.C. 317, pp. 336 *sqq.* After discussing the cases, Lord Chelmsford, delivering the opinion of the Judicial Committee, says (p. 337): "The epithet 'gross' is certainly not without its significance. The neglect for which, according to Lord Holt, a gratuitous bailee incurs liability is such as to involve a breach of confidence or trust, not arising merely from some want of foresight or mistake of judgment, but from some culpable default. . . . The degree of care and diligence which a bailee must exercise corresponds with the degree of negligence for which he is responsible." And then adds: "The negligence

for which alone they" (i.e., the bank, gratuitous bailees) "could be made liable would have been the want of that ordinary diligence which men of common prudence generally exercise about their own affairs." Further on, the judgment shews that if "no one can fairly say that the means employed for the protection of the property . . . were not such as any reasonable man might properly have considered amply sufficient," a gratuitous bailee could not be held liable; and he cannot be called upon to "multiply his precautions so as not to omit anything which can make the loss of property intrusted to him next to impossible."

In our own Court of Appeal, in *Palin v. Reid* (1884), 10 A.R. 63, it was considered (pp. 64, 65) that the "case falls within the class of cases where the bailment of goods is for the benefit of the bailor alone, and where the bailee is responsible only for gross negligence. Exception is often taken to the use of the word 'gross.' At all events we may consider that the liability can only arise from actual clear negligence." Cf. *Leggo v. Welland Vale Manufacturing Co.* (1901), 2 O.L.R. 45, at p. 49, *per* Armour, C.J.O., delivering the judgment of the Court. The *Palin* case decided also that the onus of establishing negligence is on the plaintiff—and, where the evidence is equally consistent with the absence as with the presence of negligence, the defendant is entitled to succeed, because (pp. 65, 66) "no verdict for the plaintiff should be rested on mere surmise or guess." Mr. Justice Burton (afterwards Sir George Burton, C.J.O.) says (it being the case of the loss of a box): "If we find upon the evidence that he (the defendant) did keep the box in the same manner as he kept his own, it goes a great way to dispel any presumption of gross negligence:" p. 67.

The facts of the damage, as I find them, giving such weight to the evidence of the *vivâ voce* witnesses as I think, from having seen them at the trial, their evidence should have, are as follow:—

The trunk was placed in the baggage-room of the railway company at St. Catharines, which was heated by a closed hot water system. The boiler had been bought from a Buffalo concern, the American Radiator Company, and was installed by the defendants' own men some three years before the accident—the

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"relief valve" and steam gauge were taken away each summer and tested, including the summer of 1910—at least they were taken away for that purpose.

In the system there was a tank at the top of the room which let down water through a 3-inch pipe into the boiler—then the water went into a 1¼-inch pipe, which ran through the whole station, and ultimately back into the 3-inch pipe—on the boiler was a gauge, and on the tank a safety valve, tested to 30 lbs.

The 24th December had been a very mild day, as was the 25th. The night operator, whose duty it was to look after the furnace from 7 p.m. to 7 a.m., put on fresh fuel at about 12.30 a.m., making a moderate fire, and at about 4.30 a.m. he had slightly checked the fire, then just a moderate fire, by pulling out the damper—there was then between 10 and 15 lbs. of steam in the boiler, and the gauge seemed to be working properly. At about 5 a.m., an explosion occurred. The pipes could not have frozen and had not frozen, but two sections of the boiler burst. This did not set fire to the building, but it damaged the plaintiffs' property.

Some attempt was made at the trial to shew that the closed system is not a proper system, but the evidence was not given in a satisfactory manner, and I am satisfied that the closed system employed by the defendants is a safe system, no less safe than the open system advocated by the witness whose evidence I do not attach value to. It had, moreover, been used for years by the defendants over their system, and was not found dangerous.

It is wholly impossible to find anything like the "gross negligence" for which alone a gratuitous bailee is responsible.

The same result will follow if we consider the defendants bailees for reward, warehousemen. A proper system, properly attended to, as this was according to my finding—the explosion was not due to any negligence on the part of the defendants.

It is shewn that a section may be tested by the best methods known to the trade and stand the test thoroughly; that the section may be in use two or three years, and then the section blow up without it having been possible for any one to be aware of the defect. I find as a fact that the cause of the blowing up here was a hidden defect of such a nature as that it could neither be guarded against in the process of construction nor discovered

by subsequent examination. And, in my view, even though the defendants are chargeable as warehousemen, they are not liable.

I accede in its entirety to the principle laid down in *Pratt v. Waddington* (1911), 23 O.L.R. 178, and by my own Divisional Court in *Polson Iron Works Limited v. Laurie* (1911), 3 O.W.N. 213, that where goods are taken by any one as bailee and lost (and I add "or destroyed") when in his custody, the onus is upon him to shew circumstances negating negligence on his part.

Here the defendants have shewn all the circumstances. "No evidence was kept back, all available witnesses seem to have been examined. There is no suspicion whatever of any bad faith" (*per* Hagarty, C.J.O., in *Palin v. Reid*, 10 A.R. 63, at p. 65); and it has been proved that the accident was not due to negligence.

That such a defect causing an accident does not render the defendants liable is established by *Readhead v. Midland R.W. Co.* (1867), L.R. 2 Q.B. 412 (affirmed in (1869) L.R. 4 Q.B. 379) and the long line of decisions following it.

The action will be dismissed with costs.

It is unnecessary for me to consider the other points raised.

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[DIVISIONAL COURT.]

NOBLE v. NOBLE.

*Limitation of Actions—Recovery of Land—Possession—Evidence of Tenancy—Payment of Taxes—Recognition of Ownership—Mortgage—Registered Discharge—New Starting-point.*

The plaintiff, desiring to provide his son with a home, purchased land, and mortgaged it. He let his son into possession, and the son remained in undisturbed possession from April, 1896, until April, 1907, after which his wife (the defendant) and child continued in possession until his death in April, 1908. The property was then rented by the plaintiff for a time, the rent being paid to the defendant; and, when the tenancy expired, the defendant resumed possession. During the whole period no rent was paid to the plaintiff, and he paid the interest on the mortgage and the taxes, the land being assessed to him as freeholder and to the son as tenant:—

*Held*, that, when the son was let into possession, he became a tenant at will, and the right of entry to the plaintiff accrued at the expiration of one year thereafter. In such a case, the continuation of the possession is regarded as a tenancy at sufferance, unless evidence be given that a fresh tenancy has been created; a new tenancy at will is to be implied from acts and conduct of the parties which ought to satisfy a jury (or the Court) that there is such an agreement; and here the

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facts shewed that the plaintiff was from year to year recognised as the owner and the son as the occupier or tenant—with the express assent and acceptance of the son; and, therefore, the plaintiff's right was not barred, under the Limitations Act, by the son's possession for ten years after the plaintiff's right of entry first accrued.

*Foster v. Emerson* (1854), 5 Gr. 135, followed.

*Keffer v. Keffer* (1877), 27 C.P. 257, distinguished.

*Held*, also, that, even if the son had acquired a title under the statute as against the plaintiff, the execution and registration, in 1911, of a discharge of the mortgage made by the father when he bought the land, gave a new starting-point to the statute.

*Henderson v. Henderson* (1896), 23 A.R. 577, *Lawlor v. Lawlor* (1882), 10 S.C.R. 194, and *Ludbrook v. Ludbrook*, [1901] 2 K.B. 96, followed.

Judgment of MULLOCK, C.J.Ex.D., reversed.

ACTION by Thomas A. Noble to recover possession of certain lands in the city of Brantford. The action was begun on the 31st August, 1911.

October 5, 1911. The action was tried before MULLOCK, C.J. Ex.D., without a jury, at Brantford.

*W. S. Brewster*, K.C., for the plaintiff.

*T. Woodyatt*, for the defendant.

October 23, 1911. MULLOCK, C.J.:—On the 8th day of September, 1894, the plaintiff's son, Frank Noble, married the defendant; and the plaintiff, desiring to provide them with a home, on the 20th February, 1895, purchased the lands in question, which consisted of a house and grounds in Brantford; and on the same day executed a mortgage thereon to secure the sum of \$650 and interest. On the 1st April, 1895, Frank Noble, with the defendant, his wife, took possession, and, with his father's consent, remained in undisturbed possession until the month of April, 1907, when he became insane and was removed to an asylum, where he remained until he died intestate on the 24th April, 1908, leaving him surviving his widow, the defendant, and one child, Grace, aged fourteen years. No administrator of his estate has been appointed.

When Frank Noble was removed to the asylum, his wife and child continued to occupy the premises as a home, and were in such possession on Frank Noble's death, and remained in possession until about the 30th May, 1908, when the property was rented by the defendant to one Frank Smith, who occupied it as tenant from the 17th June, 1908, until the 17th October, 1909, when he vacated, giving the key to the defendant, who retained it, and about a month thereafter resumed possession, and has so remained ever since.



There is a slight discrepancy between the evidence of the plaintiff and the defendant as to the circumstances under which the premises were rented to Frank Smith; but I think that the plaintiff, in the transaction, acted as agent for the defendant.

The plaintiff, from 1895 until 1910, each half-year paid interest accruing on the mortgage in question, and on the 29th February, 1910, paid off the principal and interest owing, and obtained a statutory discharge thereof, which, on the 11th day of January, 1911, was duly registered in the registry office.

On the 1st April, 1895, Frank Noble, on taking possession, became tenant at will of the plaintiff: *Keffer v. Keffer* (1877), 27 C.P. 257; and at the expiration of one year, viz., on the 1st April, 1896, the statute began to run in his favour.

From that date until the 1st April, 1906, he remained in undisturbed possession, not paying rent or in any way recognising the plaintiff's title; so that the plaintiff became barred on the 1st April, 1906, unless the circumstance of his having made payments on the mortgage prevented the statute running against him.

The language of the section of the statute relied upon by the plaintiff is as follows: "Any person entitled to or claiming under a mortgage of land, may make an entry or bring an action to recover such land, at any time within ten years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than ten years have elapsed since the time at which the right to make such entry or bring such action first accrued:" 10 Edw. VII. ch. 34, sec. 23 (O.)

The object of the statute was not to benefit mortgagors, but mortgagees, by making "mortgages an available security, where they were good and valid in their inception, and the mortgagee, having received payment of his interest, cannot be charged with laches:" *Doe d. Palmer v. Eyre* (1851), 17 Q.B. 366, 371.

In *Henderson v. Henderson* (1896), 23 A.R. 577, Maclellan, J.A., expressed the opinion, concurred in by Burton, J.A., that a mortgagor, on the registration of a certificate of discharge, became a "person entitled to or claiming under" the mortgage; but this opinion was not adopted by the majority of the Court. With great respect, the view of Maclellan, J.A., does not commend itself to me. Where the owner of lands mortgages the

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same, he remains in equity the owner subject to the mortgage charge; and, when it is discharged and the certificate thereof registered, the substantial result is, that the mortgage transaction has been wiped out as effectually as if the mortgage had never existed; and the owner continues as owner by reason of his original title, the mortgage never having in fact been a link in his chain of title. I, therefore, fail to see how here the mortgagor can be said to be a person entitled to or claiming under a mortgage made by himself.

The point came up for consideration in *Thornton v. France*, [1897] 2 Q.B. 143, and the view of the Court was, that the owner of land who pays off a mortgage thereon does not thereby become "a person claiming under a mortgage" within the meaning of the statute.

Following that case, I think the plaintiff must fail, unless saved by the Registry Act, 10 Edw. VII. ch. 60, sec. 62 (O.) That section declares that "the certificate when registered shall be a discharge of the mortgage, and shall be as valid and effectual in law as a release of the mortgage, and as a conveyance to the mortgagor, his heirs, executors, administrators, or assigns, or any person lawfully claiming by, through or under him or them, of the original estate of the mortgagor."

The object of that section is to enable a registered certificate to operate as a release of the mortgage and as a conveyance of the legal estate to the mortgagor or other parties entitled thereto, but not so as to defeat the rights acquired against the mortgagor after the making of the mortgage. Further, the "original estate," mentioned in the section, means the estate granted to the mortgagee, and in the present case does not include the right to possession of the mortgaged lands. That right was reserved to the mortgagor, and at no time during the currency of the mortgage was the mortgagee in possession.

In the meantime Frank Noble had, as against the mortgagor, acquired title by possession, but the mortgagor's estate in the lands did not thereby pass to Frank Noble, but remained in the mortgagor—the statute, while barring the owner from recovering possession, not transferring to the party in possession any title or estate in the land: *Tichborne v. Weir* (1892), 8 Times

L.R. 713. Thus, the registered certificate, operating as a reconveyance to the mortgagor of the "original estate" held by the mortgagee, does not include the right of possession; and, consequently, does not affect or disturb any right of possession acquired by Frank Noble.

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Mr. Brewster contended that, in the event of the plaintiff failing to recover possession, he was entitled to a lien on the land to the extent of the mortgage debt paid off by him. This contention raises an entirely new issue, not open to the plaintiff on the present pleadings and as the action is at present constituted. In the trial of such an issue, a representative of the estate of Frank Noble would be a necessary party. For such purposes, his widow, the defendant, does not represent the estate. She may ultimately have a beneficial interest in the property; but at present, as the party in possession, she is simply defending her possession against the claim of the plaintiff, who has no right to dispossess her.

For these reasons, I am unable to deal with the question thus raised by Mr. Brewster.

The action fails, and should be dismissed, but without costs.

The plaintiff appealed from the judgment of MULOCK, C.J. Ex.D.

January 8, 1912. The appeal was heard by a Divisional Court composed of BOYD, C., RIDDELL and SUTHERLAND, JJ.

W. S. Brewster, K.C., for the plaintiff, argued that the learned trial Judge had erred in holding that the plaintiff was barred by the Statute of Limitations from recovering the property in question. It was not by any means certain that the son, Frank Noble, had had possession for ten years. During the whole time of the son's occupation, the lot had been assessed to the father as freeholder, and to the son as tenant, and the taxes had been always paid by the father; and the son had not objected to this arrangement: *Foster v. Emerson* (1854), 5 Gr. 135; *Turner v. Doe d. Bennett* (1842), 9 M. & W. 643. The father having paid off the mortgage, the discharge acted as a reconveyance to him of his original title in fee, with right of re-entry from the date of repayment: *Lawlor v. Lawlor* (1882), 10

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S.C.R. 194; *Cameron v. Walker* (1890), 19 O.R. 212; *Henderson v. Henderson*, 23 A.R. 577. At all events, the plaintiff had a lien upon the property for the incumbrances paid off by him, and his right was not affected by the taking or registering of the discharge: *Currie v. Currie* (1910), 20 O.L.R. 375. He referred also to R.S.O. 1887, ch. 102, sec. 2.

*M. K. Cowan*, K.C., for the defendant, contended that the judgment appealed from was right. The plaintiff became barred on the 1st April, 1906. The fact of his having made payments on the mortgage did not prevent the Statute of Limitations running against him: *Fisher v. Spohn* (1883), 4 C.L.T. 446; *Brown v. McLean* (1889), 18 O.R. 533.

*Brewster*, in reply, referred to *Thornton v. France*, [1897] 2 Q.B. 143, at p. 158, where *Doe d. Baddeley v. Massey* (1851), 17 Q.B. 373, is cited.

January 11. The judgment of the Court was delivered by BOYD, C.:—The legal effect of the Statute of Limitations, when one is let into possession of land as in this case, is, that he becomes a tenant at will, and the right of entry to the owner accrues at the expiration of one year thereafter. The continuation of the possession is regarded as a tenancy at sufferance, unless evidence be given that a fresh tenancy has been created. A new tenancy at will is to be implied from acts and conduct of the parties which ought to satisfy a jury (or the Court) that there is such an agreement. As tersely put by Mr. Justice Channell in *Jarman v. Hale*, [1899] 1 Q.B. 994, 999, "If you find a definite acknowledgment from the tenant that he is holding by permission of the other, that is all you want." Even slight evidence would be sufficient to satisfy the Court on this head, as said by Parke, B., in *Doe d. Bennett v. Turner* (1840), 7 M. & W. 226, 235.

In *Doe d. Groves v. Groves* (1847), 10 Q.B. 486, Patteson, J., said, that, though a man has been in possession twenty years as apparent owner, yet "his acts may well amount to an admission that, during the period in question, he was in fact tenant to another."

In *Foster v. Emerson*, 5 Gr. 135, 152, Esten, V.-C., says that it is settled by the decisions that the tenancy may be shewn to

have continued beyond the end of the year, by evidence of any facts or circumstances indicating a good understanding (*i.e.*, as to a subsisting tenancy) between the parties relative to the land.

In *Turner v. Doe d. Bennett*, 9 M. & W. 643 (the same case as already cited after a new trial), it appeared that the defendant, being one of the assessors for the land-tax in the parish, signed an assessment in which he was named as the occupier of the farm in question, and the lessor of the plaintiff was named as the proprietor. And the Court said: "The defendant signs an assessment in a form which can hardly be reconciled to any state of things except a rightful tenancy of some sort, and none other appearing, and no rent being paid, there must be a tenancy at will. At all events, that document was evidence to go to a jury as to the creation of a new tenancy:" pp. 645, 646.

In the present case, during the whole period of the son's occupation and after his death, the lot has been assessed to the plaintiff as freeholder and to the son as tenant, and the taxes have been uniformly paid by the father. This appears to me to present an act *in pais* respecting the property, which manifests the very truth that the father was from year to year recognised as the owner and the son as the occupier or tenant; and this with the express assent and acceptance of the son.

The judgment in appeal proceeds upon the authority of *Keffer v. Keffer*, 27 C.P. 257, in which one of the Judges discredits the authority of a very carefully considered decision of a very strong Court in *Foster v. Emerson*, 5 Gr. 135. But this latter case is far from being overruled, and it is much more in point in its circumstances to this case than is *Keffer v. Keffer*. In *Keffer's* case, the son was entitled to hold the land apart from the Statute of Limitations. The whole conduct of the father indicated that the son was to be the owner of the farm. He entered by the direction of his father upon a wild lot, cleared the greater part of it, erected two dwelling-houses and a barn and other structures upon it, expending \$500 of his wife's money in so doing, lived on it as his home, was assessed in his own name, and paid all the taxes, without any claim for rent or interference on the part of the father for nearly twenty years; whereas in

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*Foster v. Emerson* the father had merely expressed an intention to devise the property by will to the son, and, while allowing the son the possession and usufruct of the property, retained in his own hands the ultimate control. In that case, as in this, to give effect to the statute would be to frustrate the clear intention of the owner to hold it in his own hands as the proprietor. The utmost that can be said is, that Noble bought the lot for his son, but kept the deed of it, and the defendant (the son's wife) understood that he did so because he did not want Frank (the son and her husband) to do away with the house, on account of his drinking. The father paid wages to the son for work done in the father's business, and allowed him to live rent-free on the land—the father paying the taxes and supplying materials for any repairs and outlay needed in the house. The father paid frequent visits to the place. The father, after the son's death, leased the place without objection, or rather with the assent of the wife, and let her have the rent. This was done after the expiration of the statutory ten years; and this, though done after the ten years' limit, was inconsistent with her husband being the owner, and reflects light on the real nature of the son's occupation, for the reasons fully given by Blake, C., and Esten, V.-C., in *Foster v. Emerson*, 5 Gr. 135, at pp. 148, 154.

Upon another ground also, I think the judgment in appeal cannot stand. The father purchased the lot on the 20th February, 1895, and gave a mortgage in fee for part of the purchase-money on the same day. The son went into possession in April, 1895, taking subject to the mortgage. Payments were made during the series of years by the father to the mortgagee till the mortgage was paid off in February, 1910, and the discharge registered in January, 1911. Had the son acquired a title under the statute as against the father, yet, according to *Henderson v. Henderson*, 23 A.R. 577, the execution and registration of the discharge gave a new starting-point for the statute. And the same point was decided by the Court of Appeal in *Ludbrook v. Ludbrook*, [1901] 2 K.B. 96, where Romer, L.J., says (p. 100): "If the mortgage be an existing one, and was executed before the commencement of the possession of the person claiming to have acquired a title by such posses-

on account of the purchase-money, \$5,  
receipt in the following words:—

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r. Bailey the sum of five dollars re option  
and north west of Bloor Willard.

Geo. H. Hemming."

be the option is contained in the following  
ing to Bailey:—

288 Jane Street, West Toronto, May 9, 1911.

Esq.

:—Yours to hand in reference to land on Bloor  
6 feet to sell on Bloor. It is a good corner. My  
ing \$20 per foot, about \$1,700 cash, the balance pay-  
per month. He would like to sell it *en bloc*, if not  
ffer to keep corner lot. Would be pleased to hear  
from you.

"Yours truly,

"GEO. H. HEMMING."

ter receiving this letter, Bailey saw Hemming and en-  
oured to get him to make the price \$19.50 per foot; and,  
n his refusing to do so, Bailey agreed to take the land at  
9 per foot, paid the \$5, and received from Hemming the re-  
ipt of the 14th May, 1911.

On the Monday following, Hemming saw the defendant and  
told him what he had done, and the defendant then said that a  
\$5 deposit was not enough; but, as Hemming had sold, he would  
let the sale go through.

According to the defendant's testimony on his examination  
in chief, Hemming was to submit any offer he should receive to  
the defendant, and the two were to talk it over; but on cross-  
examination he admitted that he would have been satisfied if  
Hemming had sold for \$19 per foot, and that if he could not  
get that price he was to submit any offer he might receive to  
the defendant.

The defendant's action on the Monday, after the payment of  
\$5 was made, amounted to a ratification of what Hemming had  
assumed to do as his agent, even if the authority given to Hem-

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between the plaintiff's solicitors and the defendant, the letters of the defendant referring to "the lots to be transferred," describing them, and explaining that he held them under an agreement with L.M., and referring also to the "agreement" with the plaintiff's husband:—

*Held*, that the defendant's action on the day after the payment of \$5 was made amounted to a ratification of what the agent had assumed to do, even if the agent was not authorised to enter into a contract of sale.

*Held*, also, that the agent's letter of the 9th May, if not in itself an offer to sell on the terms mentioned in it, was treated as such by both parties, as the agent's receipt shewed, and they were at liberty so to treat it; and by it, upon the plaintiff's husband's verbal acceptance, and the defendant's ratification, the defendant was bound.

*Held*, also, that the reference in the receipt given by the defendant to the purchase of the described lots was to the option contained in the agent's letter and his receipt; and, as the parol evidence shewed that the only purchase that had been arranged or agreed to was that evidenced by the agent's letter and receipt, these, with the defendant's receipt, and at all events together with his subsequent letters, contained all the essentials of a memorandum sufficient to satisfy the Statute of Frauds.

*Semble*, that, if the agent's letter and receipt had been the only writings, a contract sufficiently evidenced to satisfy the statute would not have been made out; for neither of these documents mentioned the vendor, and the reference to "my client" was not sufficient.

*Clergue v. Preston* (1904), 8 O.L.R. 94, distinguished.

*Held*, also, that the subject-matter of the contract was sufficiently identified.

*Held*, also, that the contract was not void under the Lord's Day Act, because, although the agent's receipt was signed on a Sunday, there was no completed contract until the following day.

THE plaintiff sued for specific performance of an agreement between her husband and the defendant for the sale by him to the husband of lots 1, 2, and 3 according to a plan registered in the registry office of the county of York as number 1508.

November 6, 1911. The action was tried by MEREDITH, C.J. C.P., without a jury at Toronto.

W. N. Tilley (A. J. Williams, with him), for the plaintiff.

W. Mulock, for the defendant.

January 15, 1912. MEREDITH, C.J.:—The defendant was the owner of the land in question, and placed it in the hands of a land agent named George H. Hemming, limiting the price at which he was to sell to not less than \$20 per foot of the frontage.

The plaintiff's husband entered into negotiations with Hemming for the purchase of the land, and these negotiations resulted in an agreement that the land should be sold to the plaintiff's husband at \$20 per foot. The agreement appears to have been reached on the 14th May, 1911, when the plaintiff's hus-



band paid to Hemming, on account of the purchase-money, \$5, and received from him a receipt in the following words:—

“No. 41.

May 14, 1911.

“Received from Mr. Bailey the sum of five dollars re option on the Mr. Dawson land north west of Bloor Willard.

“\$5.

Geo. H. Hemming.”

What I take to be the option is contained in the following letter from Hemming to Bailey:—

“288 Jane Street, West Toronto, May 9, 1911.

“H. F. Bailey, Esq.

“Dear Sir:—Yours to hand in reference to land on Bloor St. I have 156 feet to sell on Bloor. It is a good corner. My client is asking \$20 per foot, about \$1,700 cash, the balance payable at \$30 per month. He would like to sell it *en bloc*, if not would prefer to keep corner lot. Would be pleased to hear further from you.

“Yours truly,

“GEO. H. HEMMING.”

After receiving this letter, Bailey saw Hemming and endeavoured to get him to make the price \$19.50 per foot; and, upon his refusing to do so, Bailey agreed to take the land at \$20 per foot, paid the \$5, and received from Hemming the receipt of the 14th May, 1911.

On the Monday following, Hemming saw the defendant and told him what he had done, and the defendant then said that a \$5 deposit was not enough; but, as Hemming had sold, he would let the sale go through.

According to the defendant's testimony on his examination in chief, Hemming was to submit any offer he should receive to the defendant, and the two were to talk it over; but on cross-examination he admitted that he would have been satisfied if Hemming had sold for \$19 per foot, and that if he could not get that price he was to submit any offer he might receive to the defendant.

The defendant's action on the Monday, after the payment of \$5 was made, amounted to a ratification of what Hemming had assumed to do as his agent, even if the authority given to Hem-

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ming did not authorise him to enter into a contract for the sale of the land to a purchaser who was willing to pay the \$19 per foot.

On the 15th May, 1911, Bailey paid to the defendant \$25 and received from him the following receipt:—

“Toronto, Ont., May 15, 1911.

“Received from Mr. H. T. Bailey thirty dollars to apply on purchase of lots 1, 2, and 3 Lady Mulock estate on Bloor St. West, this transaction to be closed within ten days.

“This amount to be returned in the event of title not being clear.

“A. Dawson.”

“Lots on N.W. corner  
Bloor & Willard Sts.

“A.D.”

On the 20th May, 1911, the plaintiff's solicitors, Messrs. Montgomery, Fleury, & Montgomery, wrote to the defendant the following letter:—

“May 20th, 1911.

“A. Dawson, Esq.,

“c/o Fairbanks-Morse Canadian Manufacturing Company,

“1379-1387 Bloor Street West,

“Toronto, Ont.

“Dear Sir:—We are acting for Mr. H. T. Bailey in the purchase of certain lands at the corner of Bloor and Willard streets. We would be much obliged if you would send us a draft deed, so as to enable us to search the correct lots. We have searched certain lots which we suppose is the property agreed to be sold, but we do not see any deed to you.

“Please give this your attention, as the time for closing the matter is fast expiring, and we would like to have a survey, but cannot order the same until we are sure of the property.

“Yours very truly,

“Montgomery, Fleury, & Montgomery.”

To this letter the defendant replied as follows:—

“May 22, 1911.

“Messrs. Montgomery, Fleury, & Montgomery,

“Canada Life Buildings.

“Gentlemen:—In reply to yours of 20th regarding lands at N.W. corner of Bloor & Willard Sts. The lots to be trans-

ferred are known as Nos. 1-2-3, frontage 158' 7" according to a plan on file in Robins office, being resubdivision of plan 448. These lots are being purchased by me from Lady Mulock under agreement, which provides that deed will not be furnished until full amount is paid. My agreement will, of course, be surrendered on payment of the purchase-price less amount still due Lady Mulock. Copies of agreement will, no doubt, be on file in office of Mulock, Lee, M. & C.

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"If you require any additional information will be glad to furnish same.

"Yours truly,

"A. Dawson."

The plaintiff's solicitors wrote letters to the defendant on the 26th and 29th May, 1911, urging the completion of the sale, and in the earlier one telling him that they had a cheque from Bailey payable to his order, which they would deliver to him when they were satisfied with the title.

To these letters the defendant replied as follows:—

"Toronto, Ont., May 30, 1911.

"Messrs. Montgomery, Fleury, & Montgomery,

"46 West King St., City.

"Gentlemen:—Your letters of the 26th and 29th received. In reply have to say that the agreement I had with Mr. Bailey dated May 15th expired on the 25th, and therefore there will be no object in forwarding you the document requested in your letter of the 29th. While not recognising that Mr. Bailey is entitled to a refund of his deposit, I am enclosing cheque for twenty-five dollars (\$25.00) being the amount received from him, and the five dollars (\$5.00) which he paid to Mr. Hemming will, no doubt, also be returned upon request.

"If Mr. Bailey still desires to purchase the property, I will be very glad to consider any proposition he may make.

"Yours truly,

"A. Dawson."

The last letter from the defendant to the plaintiff's solicitors is dated the 2nd June, 1911, and is as follows:—

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"June 2nd, 1911.

"Messrs. Montgomery, Fleury, & Montgomery,  
"46 West King St., City.

"Gentlemen:—Your letter of the 1st received and contents noted. At the time of writing this letter you were, no doubt, in receipt of my letter of May 30th, but appear to have overlooked making any reference to this letter or to the enclosure.

"If you will refer to your letter of the 20th ult., you will observe that at that time you considered 'time' a very essential part of the agreement which I had with Mr. Bailey.

"The agreement was not repudiated. It elapsed through the failure of Mr. Bailey to carry out his part of the agreement within the time stipulated.

"Yours truly,

"A. Dawson."

This letter is a reply to a letter of the plaintiff's solicitors to the defendant of the 1st June, 1911, in which they acknowledged his letter of the 20th May, and called his attention to the fact that, it being an open contract, time was not of the essence of the contract.

The defendant relies on the Statute of Frauds as a defence to the action.

In my opinion, these letters and the two receipts constitute or afford evidence of a contract sufficient to satisfy the provisions of the Statute of Frauds.

Granting, as was contended by Mr. Mulock, on the authority of *Harvey v. Facey*, [1893] A.C. 552, that Hemming's letter of the 9th May, 1911, was in itself not an offer to sell on the terms mentioned in it, which, when accepted by Bailey, would have constituted a contract to sell on those terms, it was evidently treated by both parties, as the receipt of the 14th May, 1911, shews, as an offer to sell; and I do not see why the contracting parties were not at liberty to so treat it. A fair test of the correctness of this view would be afforded if it be assumed that Hemming, instead of being the agent of the owner, was himself the owner of the land; and, that assumption being made, I cannot doubt that, coupled with the receipt which he gave, the letter would at least amount to an offer to sell on

the terms mentioned in it, which would have become a binding contract on the verbal acceptance of it by Bailey.

If I am right in this view, and in the opinion I have expressed that the defendant subsequently ratified what Hemming had assumed to do as his agent, it follows that the defendant is bound.

In addition to this, the receipt given by the defendant on the 15th May, 1911, is for the \$30 "to apply on the purchase of lots, 1, 2, 3, Lady Mulock estate on Bloor St. West"—and the receipt goes on to say, "This transaction to be closed . . ." To what purchase and to what transaction does this receipt refer? Manifestly, I think, to the transaction which had been entered into by Hemming, as the defendant's agent, with Bailey; and, if this be the case, there is here also the necessary connection between the writing signed by the defendant and the letter of Hemming of the 14th May, 1911; and the two together set forth the terms of the contract in such a way as to satisfy the provisions of the Statute of Frauds.

Besides this, the defendant's letter of the 30th May, 1911, contains this statement: "In reply have to say that the agreement I had with Mr. Bailey dated May 15th expired on the 25th." This, it appears to me, is a sufficient reference to the agreement to connect the previous writings—the letter of Hemming of the 9th May, 1911, his receipt of the 14th of the same month, and the defendant's receipt of the following day—to warrant all of them being used for spelling out from them an agreement in writing sufficient to satisfy the provisions of the statute.

Still further, the defendant's letter of the 2nd June, 1911, contains this statement: "If you will refer to your letter of the 20th ult., you will observe that at that time you considered 'time' a very essential part of the agreement which I had with Mr. Bailey. The agreement was not repudiated. It elapsed through the failure of Mr. Bailey to carry out his part of the agreement within the time stipulated."

I do not think that, if Hemming's letter to Bailey of the 9th May, 1911, and the receipt of the 14th of the same month, had been the only writings, a contract sufficiently evidenced to

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satisfy the Statute of Frauds would have been made out. Neither of these documents mentions the name of the vendor, and the reference in the letter to Hemming's "client" is not sufficient: *per* Lord Cairns, *Rossiter v. Miller* (1878), 3 App. Cas. 1124, 1141; *Jarrett v. Hunter* (1886), 34 Ch. D. 182, 184, 185.

*Clergue v. Preston* (1904), 8 O.L.R. 94, is distinguishable. There the reference to the vendor, in a written offer by the agent to sell, was, "a client of ours who owns an undivided two-thirds . . ." of the land offered for sale, which was treated as a statement that the offer was made on behalf of the "owner" of the land, which is a sufficient description of the vendor: *Rossiter v. Miller*, *supra*.

The missing link is, however, supplied by the letters of the defendant, which shew that he was the vendor.

That the particulars required to make a complete memorandum for the purposes of the statute need not be all contained in one document, and that the signed document may incorporate others by reference, is well settled: Pollock on Contracts, 5th ed., p. 162; but there is more difficulty in determining what is a sufficient reference for this purpose. The rule laid down in the earlier cases, of which *Boydell v. Drummond* (1809), 11 East 142, cited by Mr. Mulock, is an example, has been relaxed in the later cases; and, as Sir Frederick Pollock says, in note (f) on p. 162 of his book, "No doubt the modern tendency is to be astute to relax rules of this kind," referring to the statement in the text that "the reference must appear from the writing itself and not have to be made out by oral evidence."

In *Ridgway v. Wharton* (1857), 6 H.L.C. 238, the reference was in these words, "Mr. Wharton's solicitor had instructions from me long since to prepare the agreement," and the Law Lords were all of opinion that parol evidence was admissible for the purpose of identifying as the "instructions" a memorandum of the terms of a proposed lease which a man named Crawter, who was alleged to have been the agent of the defendant, had sent to the defendant's solicitors as instructions for the preparation of a formal lease.

In *Baumann v. James* (1868), L.R. 3 Ch. 508, the facts were, that the plaintiff, who was a tenant to the defendant of the

premises in question, had written to the defendant's solicitors as to the renewal of his lease. The solicitor sent him a report of a surveyor, who recommended the granting of a lease for fourteen years at a given rent, if certain repairs were made by the plaintiff; the plaintiff wrote back assenting to the repairs and rent, but asking for a term of twenty-one years. No final agreement was come to, but, some months afterwards, a negotiation having proceeded between the plaintiff and the defendant without the intervention of the solicitors, the defendant, on the 21st March, 1865, wrote a letter promising the plaintiff a lease for fourteen years "at the rent and terms agreed upon," to which the tenant wrote back, on the following day, an unqualified acceptance; and it was held by the Lords Justices, affirming Stuart, V.-C., that parol evidence was admissible to connect the report and the tenant's previous letter with the subsequent letters; and that, it being conclusively established that there had never been any other rent or terms agreed upon than those mentioned in the report, there was a sufficient memorandum in writing to satisfy the Statute of Frauds. In delivering judgment, Sir W. Page Wood, L.J., pp. 511, 512, after saying that it struck him at first as a question of some difficulty whether the later letters, which only mention "the rent and terms agreed upon," could be connected with the report and the letter accepting some of its terms so as to make up an agreement in writing embodying the terms, referred to *Ridgway v. Wharton*, and said that it, to some extent, removed that difficulty, and then proceeded as follows: "In that case 'instructions' were referred to. Now, instructions might be either by parol or in writing; but it was held that it might be shewn by parol evidence that instructions had been given in writing, and that there had been no other instructions than the written document which was produced. . . . I take a similar view of the present case. Here is a reference to 'rent and terms agreed upon.' Now, . . . written report contained terms which, with the exception of that relating to the length of the lease, were acceded to by the letter . . . The letter of the 21st of March itself defines the length of the term, and we have a previous written document containing terms which the plaintiffs

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had agreed to in writing, and it is not suggested that there ever were any terms agreed to by parol, nor that there ever were any terms agreed to at all except those contained in the report . . . and the partial acceptance of . . . I say partial, because the question as to the length of the term was left open, so that there was not a concluded agreement. I am of opinion therefore that the report and the letter of the . . . are sufficiently connected with the letters of the 21st and 22nd of March, and that there is an agreement in writing within the meaning of the Statute of Frauds."

In *Long v. Millar* (1879), 4 C.P.D. 450, the defendant, an estate agent, was employed by the owner of three plots of land at Hammersmith to sell them for £310. The plaintiff agreed with the defendant to buy for that price, and to pay a deposit of £31, and he signed a document agreeing to purchase, which contained all the particulars required to make a complete memorandum, except the name of the vendor, the land being described in it as "the three plots (40 feet frontage) of freehold land in Rickford street, Hammersmith," and the defendant gave a receipt for the £31, stating that it was a deposit on the purchase of three plots of land at Hammersmith. The defendant, among other defences, relied upon the Statute of Frauds, but it was held that, although the receipt signed by the defendant was not sufficient if taken by itself, the words "purchase of three plots of land" sufficiently referred to the document signed by the plaintiff. Bramwell, L.J., said, p. 454: "The plaintiff has signed a document containing all the terms necessary to constitute a binding agreement . . . But the point to be established by the plaintiff is that the defendant has bound himself, and a receipt was put in evidence signed by him, and containing the name of the plaintiff, the amount of the deposit, and some description of the land sold. The receipt uses also the word 'purchase;' which must mean an agreement to purchase, and it becomes apparent that the agreement alluded to is the agreement signed by the plaintiff, so soon as the two documents are placed side by side. The agreement referred to may be identified by parol evidence."

In *Cave v. Hastings* (1881), 7 Q.B.D. 125, the plaintiff had signed a memorandum setting forth the terms of a contract by



which he had agreed to let a carriage to the defendant for a year. The defendant, in a subsequent letter to the plaintiff, referred to "our arrangement for the use of your carriage." There was no other arrangement for the hire of a carriage than that the terms of which were contained in the memorandum signed by the plaintiff, and it was held that the defendant's letter sufficiently referred to the document containing the terms of the contract, to constitute a good memorandum of the contract within the Statute of Frauds, sec. 4.

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In *Studds v. Watson* (1884), 28 Ch. D. 305, the facts were, that the defendant had verbally agreed with the plaintiff to sell him her share in certain property for £200, and had signed and given him the following receipt: "Sept. 22nd, 1882. Received of J. Studds one pound of my share in the Barrett's Grove property the sum of two hundred pounds." No time was fixed for completion, and no abstract was delivered, and on the 19th March, 1883, the defendant wrote to the plaintiff: "Mr. Studds,—Sir,—If the balance of £199 on account of the purchase of my share of the property be not paid on or before the 22nd instant I shall consider the agreement (made 22nd of Sept., 1882), not any longer binding;" and it was held by North, J., that the word "balance" in the letter sufficiently referred to the receipt to enable the two documents to be read together, and that they constituted a sufficient memorandum within the Statute of Frauds, sec. 4; and that, even if the word "balance" was not sufficient to connect the two documents, yet, as they both referred to the same parol contract, all the terms of which were contained in one or other of them, they could be read together, and, read together, constituted a good memorandum within the statute.

In *Wylson v. Dunn* (1887), 34 Ch. D. 569, the facts were, that a proposal had been made that the two plaintiffs should buy a triangular field of about three acres, and that the defendant should buy one-half an acre of it from them. One of the plaintiffs and the defendant met on the field; the defendant wished to have a piece in one of the angles, and the plaintiff stepped so as to mark out where a base line would cut off half an acre. Some days afterwards, the same plaintiff wrote to the defendant asking her to let them have a letter agreeing to purchase

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the half acre she had selected for £350. She wrote back, not expressly referring to the other letter, that she was willing to take half an acre as agreed upon for £350. The plaintiffs did not obtain a contract with the owner of the land for the purchase until the 4th November, which was three months afterwards. On the 13th November, the defendant threatened to withdraw, and on the 20th November, her solicitors wrote that she did withdraw from the contract; and it was held by Kekewich, J., that the second letter contained a sufficient reference to the first; and that the two letters formed a valid contract within the Statute of Frauds. The learned Judge (p. 575), dealing with the reference necessary to connect the documents, said: "Therefore the reference may be a matter of inference—that is a matter of fair and reasonable inference—but there need not be an express reference from one letter to the other."

In *Oliver v. Hunting* (1890), 44 Ch. D. 205, the defendant agreed to sell to the plaintiff a freehold property known as the Fletton Manor House for £2,375, and signed a memorandum which contained all the essentials of the contract, except that it omitted to mention or refer to the property agreed to be sold. Two days afterwards, the plaintiff, pursuant to the contract, sent the defendant a cheque for £375 as a deposit and in part payment of the £2,375, and the defendant replied by letter: "I beg to acknowledge receipt of cheque, value £375, on account of the purchase money for the Fletton Manor House estate;" and it was held by Kekewich, J., that parol evidence was admissible to explain the circumstances under which the defendant's letter was written; and that, as such evidence connected the letter and the memorandum, the two documents, read together, constituted a sufficient memorandum within the Statute of Frauds. Referring to the rule stated in *Blackburn on Sales*, the learned Judge said: "The old case of *Boydell v. Drummond* and some other cases might be consistent with that rule; but certainly of late a different rule has been introduced, and it is a rule, to say the least, consistent with the convenience of mankind, because if you were to exclude parol evidence to explain such a doubtful reference as 'the letter of the 14th instant,' or it might be simply 'your letter,' the result might in a large number of cases be gross injustice. Now, I take it to be quite settled that

in a case of that kind you may give parol evidence to shew what the document referred to was. I take it that you may go further than that, and that if you find a reference to something, which may be a conversation, or may be a written document, you may give evidence to shew whether it was a conversation or a written document; and having proved that it was a written document, you may put that written document in evidence, and so connect it with the one already admitted or proved. . . . If that is sound, which I take it to be, according to other cases, and according to the convictions of Judges in older cases which are introduced into the old law, it is difficult, perhaps, to say where parol evidence is to stop; but substantially it never stops short of this, that wherever parol evidence is required to connect two written documents together, then that parol evidence is admissible. You are entitled to rely upon a written document, which requires explanation. Perhaps the real principle upon which that is based is, that you are always entitled in regarding the construction and meaning of a written document to inquire into the circumstances under which it was written, not in order to find an interpretation by the writer of the language, but to ascertain from the surrounding facts and circumstances with reference to what, and with what intent, it must have been written. I think myself that must be the principle on which parol evidence of this kind is admitted:" pp. 208 to 210.

There are other cases that might be referred to; but, without multiplying citations, I refer to *Buxton v. Rust* (1872), L.R. 7 Ex. 279; *Haubner v. Martin* (1895), 22 A.R. 468; *Martin v. Haubner* (1896), 26 S.C.R. 142; *Maybury v. O'Brien* (1911), 3 O.W.N. 393.\*

Applying the principle of these cases to the facts of the case at bar, I am of opinion that the reference in the receipt given by the defendant for the \$30 to the purchase of lots 1-2-3 Lady Mulock's estate on Bloor street west (lots on N.W. corner Bloor and Willard streets) is to the option contained in Hemming's letter of the 9th May and his receipt of the 14th May.

The parol evidence shews that the only purchase that had been arranged or agreed to was that evidenced by Hemming's letter and receipt, and these, with the defendant's receipt, and

\*Now reported, ante 229.

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at all events together with his subsequent letters, contain all the essentials of a memorandum sufficient to satisfy the Statute of Frauds, sec. 4.

It was further objected by Mr. Mulock that the subject-matter of the contract was not sufficiently identified. Apart from the defendant's letters, I think that it is; but these letters make it abundantly clear what land was being dealt with—i.e., the land which was the subject of the written contract between Lady Mulock and the defendant.

It was also objected that, as the receipt of the 14th May appears to have been signed on a Sunday, the contract was, under the Lord's Day Act, void; but this objection is also untenable, as there was, in the view I have taken, no completed contract until the following day.

There will be the usual judgment for specific performance, with a reference, if the plaintiff desires it, to the Master in Ordinary; and the defendant must pay the costs of the action.

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[IN THE COURT OF APPEAL.]

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*Will—Construction—Residuary Clause—Division of Residue among Children in Proportion to Legacies—Alterations in Amounts by Codicil—Second Codicil—Revocation of Legacy—Substituted Gift.*

*Held*, reversing the judgment of a Divisional Court, 24 O.L.R. 5, that, upon the true construction of the provisions of the will there set out, the testator's sons H. A. H. and D. J. H. were entitled to share in the residue of the testator's estate in the proportion that the sum of \$7,000 bears to the total of the bequests of personal property; GARROW and MEREDITH, JJ.A., dissenting.

APPEAL by H. A. Hunter and D. J. Hunter from an order of a Divisional Court affirming an order of MIDDLETON, J., declaring the construction of the will of William Henry Hunter, deceased. See 24 O.L.R. 5.

October 5 and 6, 1911. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

*E. D. Armour*, K.C., for the appellants (with him, *R. B. Beaumont*, for H. A. Hunter, and *W. C. MacKay*, for D. J.

Hunter), relied upon the reasons and cases cited in the previous argument before the Divisional Court, 24 O.L.R. at p. 10, and in particular upon *In re Courtauld's Estate, Courtauld v. Cawston* (1882), 47 L.T.R. 647, [1882] W.N. 185, a case which was not cited before the learned Judge in the Weekly Court, and which is submitted to be on all fours with the case at bar. *In re Gibson Trusts* (1862), 2 J. & H. 656, which is relied on by the respondents, was cited on the argument before Kay, J., in the *Courtauld* case. The following cases were also referred to: *In re Maybee* (1904), 8 O.L.R. 601; *Dungannon v. Smith* (1845), 12 Cl. & F. 546; *In re Boddington, Boddington v. Clairat* (1884), 25 Ch. D. 685, *per* Earl of Selborne, L.C., at p. 689; *In re Boden, Boden v. Boden*, [1907] 1 Ch. 132, at pp. 149, 155; *Cooper v. Day* (1817), 3 Mer. 154; *Carrington v. Payne* (1800), 5 Ves. 404, 422. The cases of *Bonner v. Bonner* (1807), 13 Ves. 379, *Henwood v. Overend* (1815), 1 Mer. 23, and *Early v. Benbow* (1846), 2 Coll. 342, cited in the judgment of the Divisional Court, are distinguishable on their facts from the present case.

*Shirley Denison*, K.C., for the widow of the testator, relied upon the judgments appealed from, and upon the reasons and authorities cited therein, and in his previous argument before the Divisional Court, 24 O.L.R. at p. 10. He also referred to *In re Joseph Pain v. Joseph*, [1908] 2 Ch. 507, which is cited in the judgment of Teetzel, J.; *Cresswell v. Cheslyn* (1762), 2 Eden 123; *Sykes v. Sykes* (1867-8), L.R. 4 Eq. 200, 206, L.R. 3 Ch. 301, *per* Lord Cairns, L.C., at p. 303.

*J. R. Meredith*, for the infants, adopted the argument made on behalf of the widow.

*C. R. McKeown*, K.C., for the executor.

*Armour*, in reply.

January 17, 1912. Moss, C.J.O.:—This is an appeal from a judgment of a Divisional Court, reported 24 O.L.R. 5, affirming a judgment pronounced by Middleton, J., upon one of several questions submitted upon originating motion as to the construction of the last will and testament of William Henry Hunter.

A number of questions were submitted and disposed of, but the appeal to the Divisional Court was in respect of one ques-

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tion only, viz., as to the respective shares or interests of two of the testator's sons, Henry Alfred Hunter and David John Hunter, in his residuary estate.

The testator, who describes himself in the will and codicils thereto as a farmer, was evidently a man of very considerable wealth. Judging from the many parcels of land and the quantity of personal property disposed of in specie, as well as the numerous pecuniary gifts and legacies (amounting to over \$40,000) bestowed upon children, relatives, and others, it is safe to say that the will and codicils disposed of an estate the value of which probably exceeded \$150,000.

It is evident that the disposition of his estate had been the subject of careful deliberation, and that his desire was to fully express his wishes and intentions in regard to the interest or share in his estate to be taken by each beneficiary named by him.

A period of more than two years elapsed between the execution of the original will and the first codicil, but the latter shews the same care, deliberation, and fullness of expression.

And the final codicil, executed nearly three years after the first, displays similar characteristics. It may fairly be assumed that, in the changed circumstances, the testator gave full consideration and attached due weight to the position and claims of each of the beneficiaries affected by them, and made his subsequent dispositions with all these matters before him. Neither the original will, nor his ultimate testamentary disposition of his estate, appears to indicate equality of division as the governing consideration. Rather does it indicate careful consideration of all the circumstances.

It is to be borne in mind that the ultimate wishes of the testator are to be ascertained, if possible, by a proper construction of the language in which he has expressed them; and these wishes, when so ascertained, constitute his last will and testament.

In *Douglas-Menzies v. Umphelby*, [1908] A.C. 224, their Lordships of the Judicial Committee say (p. 233): "Whether a man leaves one testamentary writing or several testamentary writings, it is the aggregate or the net result that constitutes his will, or in other words, the expression of his testamentary wishes. The law, on a man's death, finds out what are the instruments which express his last will. If some extant writing

be revoked, or is inconsistent with a later testamentary writing, it is discarded. But all that survive this scrutiny form parts of the ultimate will or effective expression of his wishes about his estate. In this sense it is inaccurate to speak of a man leaving two wills; he does leave, and can leave, but one will."

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In connection with these principles, it is to be borne in mind that, as enacted by sec. 26 of the Wills Act, R.S.O. 1897, ch. 128—now sec. 27 of 10 Edw. VII. ch. 57—every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will.

Further, as regards the last will and testament in question here, it is not unimportant to note that the final codicil concludes with the following declaration by the testator: "In all other respects I confirm my said will." Up to the time of the execution of this codicil, what constituted the testator's will? It cannot be said that the original will did, for the testamentary desires therein expressed had been modified, altered, and varied by the first codicil, and the testator's will expressed up to that time could only be gathered from the original will and the first codicil. That codicil is expressed to be a codicil to the will dated the 13th February, 1904. The final codicil is described as a codicil to the last will and testament of the testator, but makes no reference to date. It is manifest that this codicil was intended to take effect as against preceding testamentary dispositions, whether found in the original will or in the first codicil.

In the case of *In re Fraser, Lowther v. Fraser*, [1904] 1 Ch. 726, the effect of a confirmatory clause in a codicil, as well since the first passing of the provision contained in sec. 27 of the present Wills Act as under the old law, is thus stated by the Court of Appeal (p. 734): "The effect . . . is to bring the will down to the date of the codicil, and effect the same disposition of the testator's estate as if the testator had at that date made a new will, containing the same dispositions as the original will, but with the alterations introduced by the various codicils."

For this proposition several authorities are cited, and amongst them the case of *In re Champion, Dudley v. Champion*, [1893]

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1 Ch. 101, wherein North, J., says (p. 111): "The codicil makes the will take effect as if it had been executed at the date of the codicil."

What is to be ascertained in the present case is the position and rights of the appellants, Henry Alfred Hunter and David John Hunter, under the residuary clause contained in what is the last will and testament of the testator, as executed and declared on the 24th March, 1909. There is only the one residuary clause, and of course it can only become effective after all the specific devises, bequests, and dispositions made by the will as a whole have been satisfied or provided for. It is not necessary to repeat the words of the residuary clause. The directions are very simple: (a) the whole residue of every nature and kind is given to the testator's children; (b) they are to share in it in proportion to the personal property "herein" (that is in the will of which this is the residuary disposition) bequeathed to his children; but (c) in calculating the proportions, the personal property bequeathed to W. H. Earl Hunter is fixed at \$2,000.

In order to ascertain the proportions in which the residuary estate is distributed, it is only necessary to find what personal property each child is entitled to receive under the bequests to them to be found in the will as it stood at the testator's death. In seeking to do so, it is of course proper to apply the usual rules of construction and find out what the testator has done, by ascertaining the meaning of the words he has used and the connection in which he has used them.

Where, as here, the meaning has to be ascertained by bringing down to the date of the last codicil what remains of all the preceding testamentary instruments, there does not appear to be any objection to looking at the original testamentary directions. But it cannot be a correct method of dealing with the will to accept the original dispositions as guides to the influences giving rise to changes. The fact of changes in the dispositions formerly made is *primâ facie* an indication of change of intention. But as to what may have led to or induced the change of intention, unless the testator has manifested it either by express statement or very clear inference, it is unsafe to seek to enter into his mind, or speculate as to the grounds which have in-



fluenced him. All that can safely be done is to take the latter directions, apply them to the earlier, and ascertain the result.

The observations of Fletcher Moulton, L.J., in the case of *In re Boden, Boden v. Boden*, [1907] 1 Ch. 132, though used in a dissenting judgment, are weighty and well worthy of attention. He says (p. 145): "Our law gives full liberty of testamentary disposition, and testators avail themselves of this liberty to the full. Courts are therefore treading on dangerous ground when they leave the actual wording of the document and permit themselves to speculate on what is a probable disposition in a will."

Dealing in the light of the foregoing principles with the provisions applicable to Henry Alfred Hunter, we find that, apart from the residuary clause, the only provision relating to him is a bequest included among a number of bequests which the testator desires his executors to pay as soon as convenient after his decease. The bequest is in these words: "To my son Henry Alfred Hunter I give the sum of two thousand dollars." Thus stood the will as to him until the execution of the first codicil, which contained a direction as follows: "I hereby order and direct that the sum of seven thousand dollars shall be paid to my son Henry Alfred Hunter in the place and stead of the sum of two thousand dollars bequeathed to him in my said will." If the testator had died while his testamentary dispositions were in this form, the amount of personal property bequeathed to Henry Alfred Hunter would, beyond question, be \$7,000, and the language of the residuary clause would have applied to the \$7,000 and not to the \$2,000, for the latter bequest was no longer to be found in the will.

It serves no useful purpose, and, as Fletcher Moulton, L.J., observed (*supra*), it may be dangerous, to speculate as to the testator's reasons for increasing the amount of the bequest. He may have thought this sum, together with the greater proportionate share under the residuary clause, would place Henry Alfred on a par with his brothers and sisters; or he may have decided, for reasons that appeared good to him, that Henry Alfred should take a greater share than his brothers. That, at all events, was the expression of his will. The only operative bequest was one of \$7,000. And nothing was said or indicated to alter the residu-

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ary clause, as, for instance, by the introduction of a provision resembling the restriction placed upon the proportion to be taken by W. H. Earl Hunter.

But, when the testator dealt once more with Henry Alfred's interests, as we find he did in the final codicil, while he revokes the bequest of \$7,000, that being the only one then extant, he expressly provides that the revocation of the bequest is not to apply to Henry Alfred's share of the testator's estate as set forth in the residuary clause. What at this time was Henry Alfred's share *in posse* in the testator's estate, reading the first codicil in connection with the residuary clause? They together formed the expression of the testator's will, which, as expressed, gave Henry Alfred \$7,000. Is there anything to be found in modification of that position?

Again, it is vain to speculate as to grounds or reasons. But there is nothing unreasonable in supposing that the testator deliberately concluded that the lands devised to Henry Alfred, and his share of the residuary personal estate, based on the proportion of \$7,000 as before, would be equivalent to the sum of \$7,000 cash and the share of the residuary personal estate. In other words, that the lands would be the equivalent of the \$7,000, and the proportion of the residuary estate might be left as it was under the operation of the will and first codicil. But, whatever may have been his motive, he chose that Henry Alfred should remain in the same position with regard to the residue of the estate as he was when he was to receive a bequest of \$7,000, out of the personal property. That was the only bequest in Henry Alfred's favour contained in what was then the testator's will, as gathered from the two papers then constituting it.

As to David John Hunter, the case appears to be even stronger. When the language of the residuary clause is applied to his case, the personal property bequeathed to him must be looked for, and that is found to be \$7,000. That is the only sum bequeathed to him, and the only other benefit he is to receive is his proportion of the residue, of which the only measure is the bequest of \$7,000.

It is said that the original will indicated a scheme in the mind

of the testator that each of his sons should receive personal estate to the extent of \$2,000, and the distribution of the residue in proportion to that sum, and that this scheme will be disturbed if the provisions of the codicils as respects Henry Alfred and David John Hunter are given effect to. It may be that the testator, when making the dispositions contained in the original will, had some such design in view; but it is evident that, if he had, it was based upon a view of all the provisions he had then made.

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But the first codicil introduced at once a change, not only as respects David John, to whom lands had been given, but as respects Henry Alfred, to whom no lands and nothing except \$2,000 had been given by the original will.

If the testator had desired to preserve the proportions mentioned in the original will, he could easily have done so by a process similar to that used in the case of W. H. Earl Hunter.

The appeal should be allowed, and it should be declared that Henry Alfred and David John Hunter are entitled to share in the residue in the proportion that the sum of \$7,000 bears to the total of the bequests of personal property, with the consequent directions.

The costs of the litigation have hitherto been directed to be borne by the estate; and, in view of all the circumstances, it is proper to continue that direction, including the costs of this appeal—the executors' costs between solicitor and client.

MACLAREN, J.A., concurred.

MAGEE, J.A.:—The will in this case is dated the 13th February, 1904. The testator died on the 24th May, 1910. In those six years there was opportunity for change, not only in the amount and items of his estate, but in the circumstances of his children and his views of their reasonable expectation or need of benefits or further benefits at his hands. And we find him making changes in the disposition of his estate. The first codicil is dated the 22nd June, 1906, and was evidently made partly in consequence of some alterations in his estate by sale and purchase, and partly because of the death of some beneficiaries, and

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partly on reconsideration of the claims of his children. The second codicil is dated the 24th March, 1909, and affected only his children.

The testator had considerable landed and personal property. He had been twice married. He mentions in his will six sons—David, Henry, Earl, James, Gordon, and Bryson—and four daughters, of whom two were married, and a son of another daughter. Of the six sons, the last-mentioned four were evidently minors. They are said to be children of the second marriage. He expressly devises among five of the sons nineteen farm half-lots, two quarter-lots, and fifty acres more, and then directs all the balance of his real estate to be sold. In the division of the specified lots among his sons, there is apparently great inequality, if one might say so without having values. Some are given absolutely, some with restraint on selling, and some only for life with remainder only to sons of the devisee. One son, Henry, gets none at all except a remote possibility of a life estate. David and his family only get two half-lots, and in the case of each of the six sons, if he leaves no son surviving, some of the property goes over to one of his brothers, and not to his daughters. In the chances to arise out of failure of sons there is no equality. James would get Earl's share and his own. Gordon would get all three, Bryson all four, and Henry the same four, without the other brother or brothers sharing. Then he makes six bequests of \$2,000 each, one to each of his six sons. Then to his daughters he gave no land, but to one unmarried daughter \$5,000 and a piano; to another, also unmarried, \$5,000; a married one, \$3,500; and to another, a life interest in the income from \$3,000, the principal of which would go to her children; and he gives to the son of another daughter \$1,500. These pecuniary legacies to his sons, daughters, and grandson amount to \$30,000. Among his own brothers and sisters, nephews and nieces, he gave \$9,000, in varying sums; and he bequeathed \$2,000 in fifteen other legacies of sundry amounts. Beside these, he gave \$10,000 to the children by the second marriage upon their mother's death, she having the income therefrom during her life. He directed that "the sums herein be-

queathed" to the children of his first marriage were to take precedence of all other legatees "herein mentioned" as to the time of payment.

Beside making these pecuniary bequests, which foot up to \$51,000, and giving specific legacies of chattels and some income from Earl's land to his wife, he gave for or to Earl at his majority a quantity of farm stock, implements, and provender, evidently worth over \$2,000, on the homestead farm. Then he puts in a proviso that, in the event of his personal property being insufficient to pay all the legacies "herein mentioned," they should abate proportionately. Finally, he adds the clause now in question: "All the rest residue and remainder of my estate both real and personal not hereinbefore disposed of I give devise and bequeath to my children they to share in said residue in proportion to the personal property herein bequeathed to my said children but in calculating the said proportions the personal property bequeathed to my son W. H. Earl Hunter is fixed at two thousand dollars." Evidently this last sentence was intended to prevent Earl ranking on the residue in respect of the other personal property bequeathed to him.

Here, then, we have legacies among the ten children varying from the income for life of \$3,000 to \$2,000, \$3,500, \$5,000, \$5,000 with a piano, and \$2,000 with a postponed interest in \$10,000, and one getting that with chattels worth over \$2,000 as well. And the residue was, except as limited in the case of Earl, to be divided in those unequal proportions.

Looking at the provision for possible insufficiency, it would seem that in 1904 the testator considered his personal estate not specifically bequeathed would be about \$51,000. If one may hazard a conjecture, where conjectures are dangerous, he was in effect saying: "I have about \$51,000 outside of my goods and lands which I have devised specifically. I will give \$11,000 outside of my wife and children. I will give my wife the income from \$10,000, but subject to the postponement of that \$10,000; the other \$40,000 I divide among my children in these varying amounts; and I doubt if there will be any balance, but, if there should be, let them divide it, not equally, but in the same proportions in which they get the \$40,000."

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Then comes the first codicil. He had purchased some other properties, disposed of part of the lands devised to David and part of those devised to Bryson; so he cancels the devises of the parcels so disposed of; without giving any reason, he takes away the remainder of David's land, and adds it to Bryson's devise, and adds a quarter-lot to Gordon's, giving him a life estate with remainder to his sons. Legatees of \$1,050 had died, so he cancels those bequests, reduces another by \$50, and makes a change in the bequest to a sister. Then he makes a bequest to David in these words: "I hereby order and direct that the sum of seven thousand dollars shall be paid to my son David John Hunter in the place and stead of the sum of two thousand dollars bequeathed to him by my said will." And he made another bequest of like amount to Henry, in similar words. He cancels the clause as to priority between the children of the two marriages, but the clause as to insufficiency of his estate is not disturbed.

This bequest to David, though it may have been given to him to make up for the land taken from him, is not stated to be in lieu of the land, but in the place and stead of the \$2,000 of money. Henry, who had practically got no land, was not losing anything, and so the increase of \$5,000 was a direct benefit.

Here, then, we find the testator rearranging his estate, in view of the changed conditions and change of mind, but again with no sign of equality. Two sons get \$7,000 each, but no land; two daughters, \$5,000 each; another \$3,500; another with her children \$3,000; and four sons, \$2,000, beside the specific legacies to one son and one daughter, and beside the remainder in \$10,000 to the children of the second marriage only.

This first codicil raised the whole question which is here for decision. That question is—did the testator, by this substitution of \$7,000 for \$2,000 to David and Henry, intend that they should share in any possible residue in that increased proportion?

But we are not left to it alone. Comes the second codicil, in which he gives his daughter Sarah a life interest in a half-lot, with remainder to one of three brothers if living, and he revokes "the bequest in my said will in favour of my son Henry Albert Hunter and in lieu thereof" gives him a section of land in Alberta and gives him another section there. The codicil proceeds:

"This revocation of the bequest in my said will in favour of my said son Henry Albert is not to apply to his share of my estate as set forth in the residuary paragraph of my said will. In all other respects I do confirm my said will."

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This second codicil is of importance as shewing that he considered the will and first codicil as being his will. It clearly was not the \$2,000 which he was taking away from Henry, but the \$7,000, and he speaks of it as being "the bequest in my said will." But the codicil shews more. The testator evidently feared that by this revocation there would be no personal property bequeathed to Henry, and therefore Henry would not even get a share of any surplus, and so he guards against that by saying that Henry shall still share in the residue. That, I think, shews that he considered that the division would be in proportion to their legacies, as settled not merely by the original will standing alone, but by the will and codicils taken together, as he himself took them as being his will; and that, if the legacy were cancelled, the share in the residue would go with it, unless he provided otherwise. Then he goes on to confirm "my said will." What will? Certainly not the original will, but the will and codicil, which together he made his will.

I think this second codicil is strong evidence that he had by his will given David and Henry each \$7,000, and that those legacies stood, as indeed the second codicil said they stood, "in the place and stead" of the \$2,000, and as if written and "herein bequeathed" in the original will, which should be read with that substitution.

It was pressed upon us that the will evidenced an intention of equality among the sons, a simple principle of levelling which the testator had in mind and which should not be lightly disturbed. But there is no basis for that argument. The facts are to the contrary. I have summarised the effect of the will with a view to that assertion. True, he gave each son \$2,000; and it may incidentally be noticed that he did not put them all in one clause, but mentions each separately, as if giving each separate consideration. But he does not make the residue divisible upon the basis of that equality of those six legacies. He divides it on the basis of the whole personalty given to them respectively. He had present to his mind the effect of doing

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so, for he limits Earl to a basis of \$2,000, but does not limit his brothers of the second marriage, who would also share in the \$10,000 after their mother's death. So that, among the six brothers, we are in the will itself getting three different rankings. Where is the sign of equality? Leaving aside the very unequal division of the realty, we look for it in vain. As between the daughters, no two alike. As between the daughters and sons, palpable inequality. As between the sons of the first marriage and those of the second, \$10,000 more given to the latter by the will, somewhat equalized by the first codicil, and again made unequal by the second; and, as between the latter themselves, Earl is given more and ranks for less than his brothers. And, as regards all the children, they are to share in the residue, not in proportion to the total property each gets, but only the personal property. It is not often one meets with a will with more apparent inequality. Had we found in the original will the legacies of \$7,000 to David and Henry, instead of the \$2,000, one would not be surprised or have felt it unjust. Henry was getting practically nothing else. It might or might not have been unjust; but, for all that appears, it would have been more just than the \$2,000. No argument can be based on injustice or inequality as regards either David or Henry, and under the wording of the first codicil the rights of both are on the same footing as to the residue. In view of the care taken in the second codicil as to the residue, it is evident that the testator had chosen his words in the first codicil and still approved of them. He could as readily have given David and John each a further \$5,000, but he gave the \$7,000 "in the place and stead" of the \$2,000, indicating, as I think, that it should be read into his will as if originally so written.

In my opinion, the true deduction from the will and codicil is this. The testator was directing his unspecified real estate to be sold, and thereby turned into personalty, and had from time to time his own idea of the value of his estate. He inserted and left standing in his will the provision for its possible insufficiency. By the codicils he was adapting his dispositions to the varied conditions of his estate. In effect he was saying at each of the three stages: "On the assumption that my estate is so much, I specify the amount my children will get out of that total.



There may not be enough, but there may be more; and, if so, let them take it in the same proportions and not equally." That seems to me to be the substantial intention throughout, and the one which he meant to give effect to, and the wording of both the first and second codicils seems to me to support it and shew that he was at each stage considering the case of each child by itself and not attempting any general system of equality. Such a scheme is a reasonable one; and I do not think any argument against the appellants can be drawn upon the ground that the construction put forward by them would be an obvious interference with an equality plan which never existed.

In connection with the deductions which are, as I think, to be drawn from the codicils, another fact is worthy of note. By the will the sums "herein bequeathed" to the children of the first marriage were to be paid first. But, so soon as he makes their bequests \$10,000 more by the first codicil, he cancels that direction. The inference most obviously suggested, though not perhaps a very strong one, would seem to be, that he considered the \$14,000 was to be looked on as "herein bequeathed," and it would be unfair to have priority for so much.

The case of *In re Courtauld's Estate, Courtauld v. Cawston*, 47 L.T.R. 647, does not seem to me so strong as the present one in its indication of the testator's intention. Of course, each testamentary document must be considered upon itself and its surroundings. Seldom are two alike. In the *Courtauld* case the legacy was actually revoked, and then the larger one given "in substitution." Those words are certainly not more indicative of intention than "in the place and stead of," which we find here, and which effect the substitution without revocation. Then, in the case referred to, the words "in the same manner as if they were here repeated" did not apply to the gift, but to the "trusts and provisions" which were to govern it, and which were indeed thus there repeated in short form as if it were necessary to repeat them in the codicil, instead of treating them as being stated in the will, and still applicable, because it was only a substitution of one amount for another. It appears to me that the testator's understanding of his own words is more clearly

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indicated by the codicils here, which shew that he treated the words of the codicil as written in the will, and not the words of the will as written in the codicil.

I fully agree with the views and reasons of my Lord the Chief Justice, and would allow the appeal.

GARROW, J.A. (dissenting):—Appeal by two legatees from the judgment of a Divisional Court, affirming the judgment of Middleton, J., construing the will and codicils of the late William Henry Hunter.

I agree with the judgment of the Divisional Court. The several questions originally involved appear to be now narrowed into one, concerning the proper construction of the residuary bequest contained in the will, which is in these words:—

“All the rest residue and remainder of my estate both real and personal not hereinbefore disposed of I give devise and bequeath to my children they to share in said residue in proportion to the personal property herein bequeathed to my said children but in calculating the said proportions the personal property bequeathed to my son W. H. Earl Hunter is fixed at two thousand dollars.”

There is no difficulty in understanding this language. It is perfectly plain and simple, as every one admits, and I am unable to see any justification or excuse for not applying it fully, exactly as it is expressed.

It was certainly not expressly revoked by anything appearing in the codicils. Nor, in my opinion, was any implied revocation or alteration effected by the circumstance, so much relied on, that the testator by the codicils has varied the legacies given in the will upon which originally it was intended that the shares in the residue should be ascertained. A codicil, in the absence of express words, only varies a will to the extent that may be necessary to give full effect to the codicil. It by no means seems to follow that, because the testator by a codicil substituted a larger pecuniary legacy than that given in the will, he also intended to increase the legatee's share, in competition with the other legatees, in the residue.

Such a result might, of course, follow as the result of language indicating such an intention, as was apparently the case

in *In re Courtauld's Estate, Courtauld v. Cawston*, 47 L.T.R. 647, where, in a case in some respects not unlike this, Kay, J., found in the language of the will and codicil enough to justify him in his carefully considered opinion in reaching such a conclusion. But, from a perusal of the case, it is quite obvious that, while there is a general similarity in the two cases, there are also material differences. There the testator had said in the codicil that he revoked the former legacies in question, and, in substitution for and not in addition, gave the new and larger legacies, "subject nevertheless to such trusts and provisions as were declared in the will . . . and in the same manner as if they were repeated." These words, and particularly those which I have put in quotation marks, Kay, J., regarded as very material. And, from them and the general scope of the will, concluded that the proper construction was to read the substitution as intended to be a substitution for all purposes, including the ascertainment of the shares of the legatees in the residue. There are no words of similar purport in this case. All we find here is a bare cancellation of the former legacy, and in its "place and stead" a new and larger legacy given. So that I agree with Teetzel, J., that the *Courtauld* case is not an authority in favour of the appellants' contention.

I would dismiss the appeal.

MEREDITH, J.A. (dissenting):—It is better, in all such cases as this, to proceed, in the first place, upon the fundamental principle and cardinal rule of construction; that is, to find out what the testator meant from the words which he has used; and that is from all the words, viewing the whole surrounding material circumstances, as much as possible, from the testator's point of view at the time when the will was made: not to begin by studying other wills, and interpretations of them, but leaving that to be done thoroughly when the will in question has been first studied; if for no other reason, because there is sometimes some danger of a disposition to fit one case into another, though one may be round and the other square, too much anxiety to find a case in point, even though we may all know that it is said that there are no two blades of grass alike, and there are undoubtedly very few wills here that are quite alike—mutual wills, which

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would have such a tendency, never having been much in vogue in this Province; and, when one comes to think of it, it is apparent that there must be great danger of a misfit in applying the mind of one man expressed in his will in other times to control the will of another made in the present day, and the more so when we cannot be sure that it is the will of the one man, when really it may be the will of him, or of them, who interpreted such will. Cases, and rules of construction, may, and indeed must, be of great assistance; but they can, and must be, very dangerous guides if we forget the governing principle, that it is not the meaning of some other will, but is the meaning of that in question, which must be learned and to which effect must be given.

We have here to deal only with the gift of the residue to the testator's sons; but, if we were to close our eyes to all else that is contained in the will and codicils in question, and to the surrounding circumstances, we would run much danger of taking the road how not to construe, rather than the road how to construe, the will. It does not, however, seem to me to be necessary to refer to context, or to circumstances, to any great extent, in order to grasp the meaning of the will, and the real mind of the testator in respect of the matters here in question.

The general scheme of them, in respect of the testator's children, was, first, an equitable division of his lands among his sons; and it does not disprove that scheme merely because one of his sons seems, in his eyes, to have worn a coat of many colours, nor because another was not counted among those among whom the division was made: such circumstances may only the more draw attention to the equity, which was in his mind, as well as elsewhere, equality.

The next noticeable feature, in this respect, is, that there was absolute equality provided for between his sons, in the pecuniary legacies given to them, and in the residuary bequest. That was, I think, clearly, the reason for the limitation of his "Benjamin's" share in the residue: this son was, under the will, to take other personal property than money; the other sons were not; the provision fixing the measure of the gifts of the residue was "in proportion to the personal property," not to the pecuniary legacies; so that, to put them all on quite the same footing,

it was necessary to provide that the favoured son's proportion should be based upon the same sum as that of each of the others. I can find no warrant for the contention made in the 4th paragraph of the reasons for this appeal; on the contrary, this circumstance makes against the appellants.

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Under the will, the son David was to get his specified share of the real estate, his equal legacy of \$2,000, and his share of the residue, if any—for the will provides for a deficit as well as for a residue—with the same complete equality.

By the first codicil, the only alteration of the will affecting this appellant, was a revocation of the devise to him, contained in the will, for reasons expressed in the codicil—one of them being that the testator had, after the making of the will, disposed of part of the land comprised in this devise—and the gift to him of the sum of \$7,000 in “the place and stead” of the \$2,000 legacy.

It was contended, for the appellants, that a rule of construction requires that when one legacy is given as a mere substitution for another, it must be held to be subject to all the incidents of the first gift; and the Divisional Court expressly recognised such a general rule; but I would much prefer to put it, in the words of the present Master of the Rolls, that “on general principles” in a simple case, the later gift is subject to the incidents of the earlier gift: it all depends upon the will of the testator to be ascertained on the fundamental principle.

The rule, as stated in the Divisional Court, would be quite too narrow an one: it could not apply to this case, because no one could say that the residuary bequest was an incident of the pecuniary legacy; it is an entirely separate gift, even though its measure depends on the amount of the pecuniary legacy.

One can readily suggest many cases in which the character of the gift in the first place would govern it in the second place, as well as many in which it would not, but all, I think, simply because the intention sufficiently appeared.

The broader way of putting it would include the appellants' cases: if, by the cardinal rule of construction, it can be found that that which they contend for was that which the testator meant, effect should be given to their contentions.

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But, to adopt a somewhat hackneyed mode of expression, there are substitutions and substitutions; and though it may not be "as plain as the nose in your face"—in some instances—I cannot think that any one can reasonably doubt that the additional \$5,000 was given in "substitution" for the land devised to David in the will, and by the codicil taken away from him in the revocation of that devise, land which in no case was to affect the amount of the residuary bequest: and I can imagine no good reason for holding, and I cannot believe, dealing with the case on the fundamental principle, that it was the intention of the testator, that the \$5,000 thus given, was to effect the exactly even division of the residue as far as the sons were concerned.

For some reason, not in any way made apparent, the other appellant—the son Henry—was devised nothing by the will; whether it was because he was the opposite of a Benjamin, or whatever the reason may have been, we get no aid from it; but, when the first codicil was made, that was repaired; immediately after readjusting David as I have mentioned, the testator gave to Henry, in the same words, exactly the same as that which was thus given to David. All the circumstances point unerringly to equality; the taking away of the land from David was made good by the \$5,000; and the lack of a devise to Henry was made good by the \$5,000 more coming to him under this codicil. I cannot think that the most contentious mind would contend that, by this codicil, these two sons were not to be put upon an absolute equality; and so, if I am right as to the one, I am right as to both.

But that is not all; in the second codicil Henry, at last, is given land; but of course with a withdrawal of corresponding money gifts; as the codicil expresses it, the lands are given "in lieu" of the bequest, adding further evidence to the already very evident scheme of the testator of equality as to lands and equality as to money; the residue to be affected only by the even shares of the moneys, as far as the sons were concerned, the lands, and that which stood in place of lands, to have no effect upon it.

The last codicil reserves Henry's right to his share under the residuary bequest contained in "my said will;" the "said" will being "the last will and testament of me" the testator.

The reference to the residuary bequest is, of course, a reference to the original will; the only residuary bequest of the testator is contained in that document. The words "my said will" may, of course, have been employed by the testator to describe the will itself in one place, and the will and codicil in another; such inaccuracies, from the strictly accurate point of view, are by no means unknown. I would not grasp at literary straws where the outstanding and controlling features are so plain, and in documents not overflowing with grammatical accuracy or literary elegance. If these lesser things were alone to be considered, it might follow that no judgment could be given in this case for want of grammatical accuracy. I do not think that these words "my said will," contained in the last codicil, help, or hurt, either side very much.

Nor do I put much weight upon the word "herein," contained in the residuary bequest; though like words seem to have had much weight in the decision of the case of *Hall v. Severne* (1839), 9 Sim. 515, adversely to a contention such as the appellants make here: see also *Early v. Benbow*, 2 Coll. 342; and *Radburn v. Jervis* (1840), 3 Beav. 450: but, again, there are cases and cases; and it may be true that none of the cases is as much like this case as two blades of grass are like one another: and yet they are something in the respondents' favour.

The contention that the original pecuniary bequests to the appellants cannot be looked at for any purpose, being in effect revoked by the first codicil, could not help them if it were right, because the codicil, upon which their present rights depend, must, of course, be looked at, and it proclaims what such original bequests were: but I would be very sorry to think that in no case can a revoked part of a will be looked at with a view to finding the testator's meaning; that the Courts must blind themselves to that which cannot but be, in some cases, of great aid in the due performance of their tasks in such cases as this; as a like method is in the interpretation of the statute-law and in other cases.

I decline to give to the codicils any greater revocatory effect than their words make necessary. I also decline to look only at two sets of figures, one in the will and the other in the codicils, in seeking the testator's intention upon the questions involved

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in this appeal—to bring my mind to the dead level of a mere “computing machine.” To look at the whole will is anything but guessing at the testator’s state of mind; disregarding anything in the will or codicil that throws light upon the subject, and concentrating the mind upon one provision only, is, in cases of doubt, likely to lead to error. If we would see and understand this will-picture, and all it was intended to convey, we must not be captivated, like the savage, by primary colours, only, but must give to all tones their due weight in the whole scheme.

I would dismiss the appeal: though, if this case were *Court-auld’s* case, I would probably likewise dismiss the appeal: neither can, by reason of their differences, control the other.

*Appeal allowed; GARROW and MEREDITH, JJ.A., dissenting.*

[IN THE COURT OF APPEAL.]

RE MILNE AND TOWNSHIP OF THOROLD.

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*Municipal Corporations—Local Option By-law—Voting on—Form of Ballot—Liquor License Act, sec. 141 (8)—Deviation Affecting Substance and Calculated to Mislead—Interpretation Act, sec. 7 (35)—Effect on Result—Municipal Act, sec. 204—Onus.*

The form of ballot paper used for voting on a local option by-law was “For the By-law” and “Against the By-law,” instead of “For Local Option” and “Against Local Option,” as prescribed by sec. 141, sub-sec. 8, of the Liquor License Act, R.S.O. 1897, ch. 245, as amended by 8 Edw. VII. ch. 54, sec. 10. There was uncontradicted evidence that voters were confused and misled by the form of the ballot paper:—*Held*, that the by-law must be quashed.

*Re Giles and Town of Almonte* (1910), 21 O.L.R. 362, distinguished.

*Per Moss, C.J.O.*:—Where it is shewn that a mistake was made in the use of the form or that there was a deviation from the form prescribed, it lies upon the party seeking to support what was done to make it appear that it was of such a nature as not to affect the substance of the voting or to be calculated to mislead (*Interpretation Act, sec. 7 (35)*) and did not affect the result (*Municipal Act, sec. 204*); and the contrary was shewn.

*Per MEREDITH, J.A.*:—The evidence put it beyond any reasonable doubt that the mistake did affect the substance, and was calculated to mislead, and may have affected, and probably did affect, the result.

Judgments of SUTHERLAND, J., and a Divisional Court, reversed.

MOTION on behalf of David Milne for an order that by-law No. 13, passed on the 4th February, 1911, by the Municipal Council of the Township of Thorold, and intituled, “A By-law to Prohibit the Sale by Retail of Spirituous, Fermented, or other Manufactured Liquors in the Municipality of the Township of Thorold,” be quashed.



April 6, 1911. The motion was heard by SUTHERLAND, J., in the Weekly Court at Toronto.

*J. Haverson*, K.C., for the applicant.

*H. S. White* and *J. F. Gross*, for the respondents.

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April 10, 1911. SUTHERLAND, J.:—The motion was made upon the following, among other, grounds:—

1. That the ballots used for voting on the said by-law were not in accordance with the form prescribed by sub-sec. 8 of sec. 141 of the Liquor License Act, in that, instead of being in the form prescribed by the said Act, requiring the words "For Local Option" and "Against Local Option," there were used the words "For the By-law" and "Against the By-law."

2. That, by reason of the use of the said ballot, many electors were misled, and the vote as given does not truly represent the vote of the electorate.

The vote upon the said by-law was taken on the 2nd January, 1911, when 330 votes were cast for the by-law and 209 against it, with the result that the by-law was carried by a small but substantial majority beyond the three-fifths majority required.

The form of ballot used has printed on the face of it, in rather small type, the following words: "January 2nd, 1911, voting on by-law to prohibit the sale of intoxicating liquors submitted by the Council of the Township of Thorold," in addition to the words "For the By-law" and "Against the By-law."

It appears that at the election in question, in addition to the regular municipal ballot for the purpose of electing members to the council, there was a third ballot similar in size to the ballot which I shall term the "Local Option Ballot," already mentioned, but different in colour, and having printed upon it the following, "January 2nd, 1911, voting on by-law to grant certain rights to the Niagara Falls, Welland and Dunnville Electric Railway, submitted by the Council of the Township of Thorold," and also the words "For the By-law" and "Against the By-law."

It is contended on behalf of the applicant, that, in consequence of the similarity of these ballot papers, and in conse-

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quence of the fact that the local option ballot was contrary to the statutory form, in that it did not have the words "For Local Option" and "Against Local Option," but the substituted words "For the By-law" and "Against the By-law," the electors were confused and misled, no proper vote can be said to have been taken, and the by-law should be set aside.

Considerable evidence was taken intended to shew that the electors had been made familiar, by canvassers on both sides, with the proper form of ballot to be used at the election; that on the day of the election attention was called to the ballot not being in proper form; and that in individual cases electors had actually been confused, spoiling their ballots, and being compelled to ask for a second ballot before succeeding in properly recording their votes.

Evidence was also adduced to the effect that one elector had actually been misled, had marked his ballot wrongly, and only learned later what he had done, by discussing the form of the ballot with other persons.

The evidence is confined to some half a dozen voters alleged to have been confused; and the suggestion in several of these cases is, that its form led them to think that they were voting "For Public Houses," that is to say, for the continuation of the sale of liquor in public houses, rather than for a by-law to prohibit such sale. The evidence as to this does not impress me as at all satisfactory. It is, of course, a pity that in this case, as in so many cases in connection with the submission of by-laws of this character to the people, plain statutory requirements should not be observed. It is very difficult, however, to see how any intelligent person could be confused and misled, as the witnesses in question state they were.

In the case of *Re Sinclair and Town of Owen Sound* (1906), 12 O.L.R. 488, in which "it was objected that the voters were confused or misled by the colour of the ballot papers being similar to that used for voting upon another by-law at the same time and place. One was scarlet, the other pink. Each ballot had printed on its face a statement of its purport and effect:—*Held*, that no person of ordinary intelligence, exercising ordinary care, could mistake one for the other; and this objection

was . . . overruled." In the present case each ballot "had printed on its face a statement of its purport and effect."

And in the case of *Re Giles and Town of Almonte* (1910), 21 O.L.R. 362, it was held, after the passing of 8 Edw. VII. ch. 54, sec. 10, by which it was provided that sec. 141 of the Liquor License Act is amended by adding thereto the following sub-section: "8. The form of the ballot paper to be used for voting on a by-law under this section or any sub-section thereof shall be as follows:—'For Local Option'—'Against Local Option;'" that, where the ballot paper used was not that prescribed by the said amendment, but "For the By-law" and "Against the By-law," such defect in form was cured by the Interpretation Act, 7 Edw. VII. ch. 2, sec. 7 (35), and that the mistake was not such as was calculated to mislead the voters. It was held in that case by Meredith, C.J.C.P., 1 O. W.N. 698, in the first instance, "that the expressed wish of the voters ought not to be defeated by the clerk's mistake in departing from the words of the statutory form, where it is not shewn that the departure confused any one and so prevented the will of the voters from being manifested; that the circumstances brought the case within the gauge of the Interpretation Act, 7 Edw. VII. ch. 2, sec. 7 (35)." And in appeal from that decision, as reported in 21 O.L.R. and already cited, Britton, J., says, at p. 364: "Then this mistake was not in this case calculated to mislead. It was not even plausibly suggested how any voter could in voting upon this by-law be misled by the mistake in the words upon the ballot." And further: "No one has said that he or any one else was misled." And Clute, J., at p. 365, says: "Although the words used were 'For the By-law,' instead of 'For Local Option,' they were, in my view, the same in substance. Nor do I think the change was calculated to mislead any voter."

The conduct of the election in question is not attacked in any other material respect. It is, however, contended by counsel for the applicant that he has distinguished the present case from those already adverted to in this judgment, by shewing that several persons were actually misled, and that the effect of this is to supply something which, had it been present in those cases, would have led to a different result.

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It seems to me, however, that, in view of the decision of an appellate Court in *Re Giles and Town of Almonte*, as to a ballot in the form in question, it would not be proper for me, even under the circumstances disclosed upon this application, to set aside the by-law in question. The will of the electors should be given effect to, if possible. I cannot see, upon the evidence before me, that the result of the election has been affected by the alleged confusion caused to the electors by the form of the ballot.

With some hesitation, I dismiss the application; but I think, under the circumstances, it should be without costs.

The applicant, David Milne, appealed from the order of SUTHERLAND, J., to a Divisional Court.

May 10, 1911. The appeal was argued by the same counsel before a Court composed of BOYD, C., LATCHFORD and MIDDLETON, JJ., and was dismissed with costs.

The applicant then, by special leave, appealed to the Court of Appeal.

November 17 and 20, 1911. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

*J. Haverson*, K.C., for the appellant. The learned Judge before whom the motion to quash was made, and the Divisional Court which affirmed his judgment, thought they were bound by the decision in *Re Giles and Town of Almonte*, 21 O.L.R. 362, in which it was held that a similar defect in the form of ballot prescribed by the Liquor License Act, sec. 141, as amended by 8 Edw. VII. ch. 54, sec. 10, was cured by the Interpretation Act, 7 Edw. VII. ch. 2, sec. 7 (35), and that the mistake was not such as was calculated to mislead the voters. The judgment of Mabee, J., in *Re Sinclair and Town of Owen Sound*, 12 O.L.R. 488, at pp. 493, 494, shews the confusion that is sure to arise from mistakes of this nature; and, though his judgment was reversed in a higher Court, the final decision was given before the passing of the amending Act of 1908, which, it can scarcely be doubted, was passed for the express purpose of preventing voters being misled as they have been in connection with this by-law. It is submitted that the deviation

from the prescribed form of ballot is a matter "affecting the substance," within the meaning of the Interpretation Act, and is not cured by the application of that Act. Nor is the illegality cured by sec. 204 of the Municipal Act, as the voting cannot be said to have been conducted in accordance with the principles of the Act, and the onus of proving that the result of the voting was not affected lies on the respondents, which onus has not been satisfied: *Re Hickey and Town of Orillia* (1908), 17 O.L.R. 317.

*G. F. Shepley*, K.C., and *H. S. White*, for the respondents, argued that the question for decision was covered by the judgment in the *Giles* case, and the appeal should be dismissed for the reasons given by the learned Judges of the Divisional Court in that case. The appellant has attempted to distinguish this case on the ground that the evidence here shews that certain voters were actually misled; but this evidence is subject to objection; and, moreover, the question whether or not the changed form of ballot was calculated to mislead is not one for evidence, but is a question of law to be decided by the Court on looking at the two forms of ballot papers: *Payton & Co. v. Snelling Lampard & Co.*, [1901] A.C. 308, 311. It was the duty of the voter to read his ballot paper before marking it: *Re Sinclair and Town of Owen Sound*, per Mulock, C.J., 12 O.L.R. at p. 504. Reference was also made to *Re Lincoln Election* (1878), 4 A.R. 206, at p. 210.

*Haverson*, in reply.

January 17, 1912. Moss, C.J.O.:—The applicant, David Milne, moved before Sutherland, J., to quash by-law No. 13 of the Township of Thorold—a by-law commonly known as a local option by-law—to prohibit the sale of liquor in the municipality. The motion was dismissed, and upon appeal to a Divisional Court the order of dismissal was affirmed. And this is an appeal from that decision.

The ground on which the by-law was attacked was, that the ballot papers used at the voting did not comply with the provisions of sec. 10 of the Act 8 Edw. VII. ch. 54—amending sec. 141 of R.S.O. 1897, ch. 245—whereby it is enacted that the

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ballot paper to be used for voting on a local option by-law shall have printed upon it the words "For Local Option" and "Against Local Option."

Upon the argument of the appeal, counsel for the respondents virtually conceded—and properly so—that the form of ballot used for voting in this instance was not framed in compliance with the provisions of the amending Act, and that the by-law could only be supported, if at all, under sec. 204 of the Consolidated Municipal Act, 1903, and sec. 7 (35) of the Interpretation Act, 1907. But he contended, and the Courts below appear to have given effect to the argument, that it had not been shewn that the deviation from the prescribed form did affect the substance, or was calculated to mislead, or that the mistake in the use of the forms did affect the result of the election.

Sutherland, J., in the first instance, and the Divisional Court on the appeal, appear to have treated this case as governed by the decision of a Divisional Court in the case of *Re Giles and Town of Almonte*, 21 O.L.R. 362, affirming an order made by Meredith, C.J., 1 O.W.N. 698.

In that case the Courts seemed to consider that the onus was on the applicant to shew by evidence that the mistake did not mislead or affect the result of the election. But, where it is shewn that there was a mistake made in the use of the form or that there was a deviation from the form prescribed, the rule, upon general principles, should be, that it lies upon the party seeking to support what was done to make it appear that the departure was of such a nature as not to effect the substance of the voting or to be calculated to mislead and did not affect the result.

It happened that in the *Giles* case there was no evidence one way or the other, and so the Courts were apparently able to see their way to upholding the by-law.

But the circumstances which appear in this case are such as to render it entirely different from any of the decisions upon which reliance is placed for supporting this by-law.

The applicant, accepting the view that the onus was upon him, adduced evidence from which it is apparent that voters

were misled and persons who intended to vote were unable intelligently and properly to mark their ballot papers.

The evidence shews that the form of ballot paper used did lead to confusion and create difficulty in the minds of a number of voters as to the proper manner of recording their votes.

The Legislature has deemed it proper specially to provide that in the case of voting upon local option by-laws the ballot paper shall be in a form calculated to distinguish it from that to be used in voting upon other by-laws. No doubt, the object of this provision was to prevent just such confusion and difficulty as has been shewn to have occurred in this case.

In the face of the very positive provision of the statute and in view of the evidence, it is beyond question that the mistake in adopting such a widely different form to that prescribed was a substantial departure from the directions of the Act and was calculated to mislead, and did actually mislead.

The appeal should be allowed and the by-law quashed with costs throughout.

MEREDITH, J.A.:—It is difficult to imagine a more careless mistake, of this character, than the departure, from the plainly prescribed form of ballot, which was made in this case; it was quite inexcusable, as well as being not in accordance with the law.

But it is contended that it had no effect in substance, and that it was not calculated to mislead, and also that it did not affect the result of the voting: facts which the respondents must establish, to an extent sufficient to sustain the by-law; not things which must be negatived by the appellant.

Expressing my own views of these matters of fact, I cannot doubt that the mistake was calculated to affect, and did affect, "the substance" and was "calculated to mislead" and did mislead: how could anything else, reasonably, be thought? "For Local Option" and "Against Local Option" are not at all like "For the By-law" and "Against the By-law," and the difference is the much more apt to mislead when, at the time of voting for or against local option, the voters are called upon to vote for or against some other by-law in regard to which it is proper to mark the ballots "For the By-law" and "Against the By-law."

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The printing in small type, at one end of the form of ballot in question, gives information which, if read, would make it plain, to him who can read and understood plain words, that it related to the prohibition of the sale of intoxicating liquors, but by no means as plainly that, "For the By-law" meant for the prohibition, and not, for the liquors; but how many voters would take the pains to read these words, even if they observed them; and how many could read them without their "glasses," in the crude, and frequently ill-lighted, compartments of polling booths?

But, if not entitled to give evidence myself, and to determine this case upon such evidence, that which I have expressed as my view of the facts is abundantly proved by competent witnesses, and there is no testimony to the contrary. This evidence puts it beyond any reasonable doubt that the mistake in the form of the ballot did affect the substance, and was calculated to mislead, as well as that it may have affected, and probably did affect, the result; as well might be the case in all three respects.

When one voter seeks to thrust his opinions down the throat of another voter, whether it be for "local option" or for the repeal of "local option," he cannot reasonably find fault if the Courts require him to perform the operation only in the manner in which the law permits it to be done.

I would allow the appeal and quash the by-law.

GARROW, MACLAREN, and MAGEE, JJ.A., concurred.

*Appeal allowed.*



[IN THE COURT OF APPEAL.]

GRAHAM V. GRAND TRUNK R.W. CO.

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*Negligence—Railway—Section-man Killed on Track—Train Running East upon North Track—Absence of Head-light in Fog—Rules of Company—Findings of Jury—Inference—Contributory Negligence.*

Early on a foggy morning in September, the plaintiff's husband, a section-man employed by the defendants, was working on the north track of the defendants' double-tracked line, when he was struck by an engine coming from the west upon the north track, and killed. He must have heard the engine approaching, but supposed that it was on the south track, which was the usual one for east-bound trains. In an action by his widow to recover damages for his death, the jury, in answer to questions submitted, found that the defendants had been negligent in: (1) "neglecting to switch back train on to right line at Lyn;" (2) not carrying a head-light. The jury also found that there had been no contributory negligence; and they assessed the plaintiff's damages at a sum for which the trial Judge pronounced judgment in her favour, with costs:—

*Held*, on appeal, that there was no proper evidence to support the first finding of negligence; but (MEREDITH, J.A., dissenting) that, as there was uncontradicted evidence that the engine had no head-light, as the defendants' rules provided that a train running when obscured by fog must display a head-light, as the jury might well infer that, if it had been displayed, it probably would have prevented the accident, as the point was, though not specially mentioned in the pleadings, submitted to the jury by the trial Judge, without objection, and was, in the circumstances, one proper for their consideration, and as there was evidence upon which the jury might well negative contributory negligence, judgment was properly given for the plaintiff.

*Per MEREDITH, J.A.*:—The jury may act upon proper presumptions of fact, but may not draw upon their imaginations, nor supply facts which ought to be proved under oath. The analogy of judicial notice obtains to some extent, but is limited to a few matters of elemental experience; and it is not in the category of elemental experience that in a dense fog in the daylight the head-light of an engine would have conveyed to the deceased the fact that the train was running on the east-bound track, in time to save him from his assurance that it was on the other track. There was not a particle of evidence that the negligence of the defendants in running the train without a head-light was the cause of the accident; and there should be a new trial.

The statement of claim was as follows:—

1. The plaintiff is the widow of David J. Graham, late of the township of Elizabethtown, in the county of Leeds, section-man, deceased, who was run over and killed by a freight train of the defendants, on the 16th September, 1910.

2. Letters of administration to the property of the deceased David J. Graham were granted to the plaintiff by the proper Surrogate Court in that behalf.

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3. The said David J. Graham, deceased, left him surviving the plaintiff, his lawful widow, and one infant child, William David Graham, two years old, his only next of kin.

4. David J. Graham, at the time of his death, was a workman in the employ of the defendants as a section-man on the double-tracked railway line of the defendants, near Lyn, Ontario.

5. The trains operated by the defendants over their said double-track, in accordance with the rules and regulations of the defendants, are run as follows: east-bound trains over the south track and west-bound trains over the north track; and, at the time of the accident to the deceased, he was aware that this was the practice and custom of the defendants in reference to the operation of their double-track for west-bound and east-bound trains.

6. On the 16th September, 1910, the said David J. Graham proceeded to work on the defendants' north or west-bound track near Lyn station, under the supervision and directions of the section foreman, L. Flynn, who was the foreman to whose orders the deceased was bound to conform, and did conform, and, while so employed, the deceased was run over and killed by a freight train, proceeding east on the west-bound or north track.

7. At the time of the said accident, there was a heavy fog over the tracks in question, and so thick that objects could not be distinguished at a distance of forty feet away. Knowing the conditions to be such, it was the duty of the said section foreman to have protected the deceased, while at his said work; and, in consequence of the negligence of the said foreman, in failing to protect the said deceased from danger, while carrying out the orders of the said section foreman, the deceased was run over and killed.

8. The plaintiff further says that it was the duty of the defendants to have given notice or warning to the deceased that the east-bound freight train in question was not proceeding on the south track as usual, but was proceeding eastward on the north track, which was unusual; and, in consequence of the neglect and breach of duty on the part of the defendants to give the deceased reasonable notice or warning of the approach of the said train, the deceased was run over and killed.

9. The plaintiff further says that, in consequence of the heavy fog existing at the time and place of the said accident, and of the further fact that the said train was proceeding east on the west-bound track, it was the duty of the engineer in charge of the engine of the said freight train to give reasonable warning of the approach of the said train to the deceased and others lawfully employed upon the said track. In violation of his said duty, the said engineer did not give any notice or warning of his approaching train to the deceased; and, as a result thereof, the said engine struck and killed the said David J. Graham, while lawfully at work on the said track.

The plaintiff claims \$1,500 damages.

The statement of defence was as follows:—

1. By statute 16 Vict. ch. 37, sec. 2, also the Railway Act, R.S.C. 1906, ch. 37, sec. 306, both public Acts, the defendants say that they are not guilty as in the plaintiff's statement of claim alleged.

2. The defendants deny the allegations contained in the plaintiff's statement of claim, and put the plaintiff to the strict proof thereof.

3. So far as the plaintiff's claim is founded upon any alleged right to recover at common law, these defendants say that they are a corporation and acting under the provisions of the various statutes passed respecting them.

(a) That the corporation, as such, cannot be liable for any error in judgment in its employees as to the proper system to be adopted or precautions to be taken.

(b) That the defendants' business in Canada is directed and superintended by a board of directors whose headquarters are in London, England, and is carried on in Canada by careful, skilled, experienced, and competent men, who give their full time and attention thereto.

(c) That, for the purpose of carrying on the said business in Canada, they are supplied with all necessary material and everything for the proper and efficient maintenance and management of the defendants' business.

(d) That for the said purpose they employ only skilled and experienced workmen who are fully competent to perform the various duties assigned to them.

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(e) That, if the alleged accident was in any way caused by reason of the negligence of a person in the service of the defendants, as alleged by the plaintiff, and which the defendants deny, the same was caused by the act of a fellow-servant engaged at the time thereof in a common employment with the deceased, and for any alleged default or negligence of such fellow-servant, these defendants are not liable to the plaintiff.

4. The defendants say that the accident complained of in the statement of claim was not caused:—

(a) By reason of the negligence of any persons in the service of the defendants, who had superintendence of the said train or locomotive or premises in question intrusted to them whilst in the exercise of such superintendence.

(b) By reason of the act or omission of any person, other than the deceased, in the service of the defendants, done or made in obedience to the rules and by-laws of the defendants.

(c) By reason of the negligence of any person other than the deceased in the service of the defendants who had charge of any points, signals, trains, tracks, buildings, or premises upon the defendants' railway.

(d) By reason of any defect in the condition or arrangement of the ways, works, machinery, plant, buildings, and premises in connection with or intended for the use of the business of the defendants.

5. The accident to the deceased complained of in the statement of claim was not caused through any neglect or omission on the part of the defendants, as alleged in the said statement of claim; but, on the contrary, the said accident and injury were due solely to neglect and want of care on the part of the said deceased and not otherwise, by reason of which, the defendants submit, the plaintiff is precluded from recovering in this action.

6. The defendants, for the reasons above set forth, submit that this action should be dismissed with costs.

The action was tried before SUTHERLAND, J., and a jury.

The questions submitted to the jury and their answers were as follows:—

1. Was the death of the deceased the result of negligence on the part of the defendant company? A. Yes.

2. If so, wherein did such negligence consist? A. By the servants of the company failing to do their duty by neglecting to switch back train on to right line at Lyn and not carrying a head-light.

3. Or was the death of the deceased the result of any negligence on his part? A. No.

4. If so, wherein did such negligence consist?

5. Could the deceased, by reasonable care, have avoided the accident? A. No.

6. If the 5th question is answered "yes," what could he have done to avoid it?

7. Damages? A. \$1,500, divided \$600 to plaintiff and \$900 to her child.

Upon these findings, SUTHERLAND, J., entered judgment for the plaintiff for \$1,500 and costs.

The defendants appealed to the Court of Appeal.

November 21, 1911. The appeal was heard by Moss, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

*I. F. Hellmuth*, K.C., for the defendants, argued that there had been no negligence shewn on the part of the defendants, causing the accident. Upon the evidence adduced, the accident arose owing to the negligence of the deceased, and the finding of the jury to the contrary was perverse. There should have been a nonsuit.

*J. A. Hutcheson*, K.C., for the plaintiff, contended that the doctrine of *res ipsa loquitur* applied. The mere happening of the accident was presumptive evidence of negligence against the railway company. No warning had been given that the train was travelling on the wrong track. The train could have crossed to its proper track at a cross-over, a little to the west of where the deceased was killed. The finding of the jury that the locomotive had no head-light displayed, as required by rule 156 of the operating rules of the railway company, was based upon evidence which was not contradicted.

*Hellmuth*, in reply.

January 17, 1912. GARROW, J.A.:—Appeal by the defendants from the judgment at the trial before Sutherland, J., and a jury.

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The action was brought by the plaintiff, as widow and administratrix of her late husband David J. Graham, who was in the employment of the defendants as a section-man on the Lyn section, and while so employed was struck by a moving engine and killed.

The accident occurred early in the morning of the 16th September, 1910, described in the evidence as an unusually thick, foggy morning.

The defendants' line of railway at the point in question runs east and west, and is double-tracked. Engines proceeding east use the south track, and those proceeding west, the north track.

The section-men, of whom there were in all three and a foreman, were, on the morning in question, put to work by the foreman at ties in the north track. And it was while working on that track that the deceased was struck.

The engine came from the west—the reason being that an accident had occurred near Mallorytown, nine miles west of Lyn, upon the other track, which made it necessary temporarily to use the north track for east-bound engines.

The jury, in answer to questions submitted, found that the defendants had been negligent in: (1) “neglecting to switch back train on to right line at Lyn;” and (2) not carrying a head-light; that there had been no contributory negligence; and assessed the damages at \$1,500.

The learned counsel for the defendants now contends that there was no proper evidence to support these findings. And as to the first, the objection is, I think, well founded. It is probable, as suggested upon the argument, that the jury may have acted upon local knowledge as to the location of switches at or near Lyn, which does not appear in the evidence, which, so far as I have seen, does not indicate that what the jury finds as to switching back to the other track could have been done between Mallorytown and Lyn, where the accident to the deceased happened.

But upon the other ground, while the evidence is certainly meagre, it is, I think, sufficient.

Cook, one of the section-men, said: “Q. Did you see any head-light on the engine? A. I did not see none at all. Q. Were you in a position where you could have seen the head-light if there

had been one? A. Yes." And he was not contradicted, nor even cross-examined, as to these statements.

The defendants' rules were also put in, and one of them (156) provides that a train running when obscured by fog must display the head-light in front. The fog on the occasion in question was so dense, according to the evidence, as quite to obscure objects more than 60 or 70 feet away. The train was proceeding at a speed of 30 to 35 miles an hour. The proper whistles were proved to have been given, and were, no doubt, heard by the deceased, but he quite naturally would assume that, as they came from the west, the approaching train was upon the south track, and so continued at his work, as did both East, who also was killed, and Cook, who at the last moment escaped. There is no evidence that the bell was ringing, and no finding as to it.

The section-men knew nothing of the accident near Mallory-town necessitating a change in the use of the tracks until afterwards. No one at Lyn apparently did, not even the operator. Under these circumstances, it was especially incumbent, in my opinion, upon the defendants to have had the head-light displayed. And it was, I think, competent for the jury to infer that, if it had been lit, it probably would have prevented the accident. There would be less likelihood of such a continuous signal miscarrying than there was of those given by mere sound, under the unusual and ambiguous circumstances which we have here. The rays would, of course, extend somewhat beyond the mere line of track on which the engine was proceeding, but they would, naturally, be densest and most visible upon that track.

The point was, without objection, submitted to the jury by the learned trial Judge in his very full and careful charge, and was, under all the circumstances, one quite proper for their consideration.

I would dismiss the appeal with costs.

MAGEE, J.A.:—The jury seem, from their first finding as to particulars of the defendants' negligence, to have considered that the switch at Lyn connecting the north and south tracks was west of the place where the fatality occurred, which was at or close to the tool-house or hand-car-house, and that the train could by that switch have resumed the usual east-bound course on the

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south track before reaching that point. The track there is lower, owing to crossing a creek valley, so that there is an up-grade each way from Lyn. The witness Bouley says the cross-over switch is "just a little bit above the car-house." Whether this means up the grade on the east or the west or up-stream of the St. Lawrence does not appear. The trial was at Brockville, east of Lyn, and very likely the witness meant beyond, that is, west of, the car-house. Counsel are not agreed, even here, as to the locality of the switch. The jury possibly acted upon some knowledge of the locality, or of the current form of speech there as to east and west, but the fact cannot be said to have been proved, nor, even if it had been, that the switch could have been used by that train in view of other possible trains.

But I agree that the judgment should stand upon the other negligence found as to the head-light. The plaintiff called, as to that, the only survivor of the three section-men. The foreman was in the tool-house at the time. The plaintiff was not bound to call the engineer or fireman to prove a breach of duty by themselves. It seems to have been admitted or asserted on both sides that the engineer was in the court-room during the trial.

The question as to the head-light was deliberately asked during the examination-in-chief of the plaintiff's first witness, called as to the circumstances of the occurrence.

The statement of claim alleged that there was a dense fog, and it was the duty of the engineer to give reasonable warning of the approach of his train. The defendants' own rule shews that they consider one reasonable means of warning in a fog to be a head-light. Its importance is manifest from the fact that, if these men had been working west of the whistling place for the semaphore, as but for the foreman's caution they might well have been, they would have had no other warning of the approach of the train on the unusual track. The deceased was faced to the south, which would be at or nearly at right angles to the track, and was bending downward at his work. In such a position the reflection of a light upon the steel rails might well have attracted his attention, or even possibly the moving shadows on the fog of the two men to the west of him or of himself or his adze. A second might have saved him. All that was for the jury. The defendants deliberately took their stand upon the



evidence given. Meagre though it was, it was uncontradicted. No surprise was sprung upon them; and I do not think the plaintiff should be subjected to the expense, delay, anxiety, and hazard of another trial.

Then I cannot say that the jury were wrong in negating contributory negligence. It would mean not only negligence on the part of Graham, but also of East, who lost his life, and Cook, who barely escaped. There is no compelling evidence that any instance of a train running on the left-hand track had occurred during Graham's work—from April to September—upon the railway. The foreman says it had not happened all the time he was on that section, and his foremanship began in June. Cook only says he guessed it would be weeks, not months, since he knew of an instance, but he had only been working since June, and not for two years before. The jury might well have discounted the foreman's general statement that he had warned the whole gang to watch both ways. Even if it be assumed that Graham heard the first whistle for the crossing, he might well assume that it was given at the usual distance from the highway crossing, near which they were working. Yet Cook says, "I heard it at (for?) the crossing, I looked up, and the thing leaped at me. I did not have time to jump." The jury might well find that there was no negligence of Graham.

I agree that the judgment should stand.

MOSS, C.J.O., and MACLAREN, J.A., concurred.

MEREDITH, J.A. (dissenting) :—The difficulties which surround this case have arisen largely, if not altogether, from the plaintiff adducing as little evidence, upon essential points, as possible, trusting to the jury to do the rest in her interests; and from the defendants giving no evidence at all, though some of the material facts were especially within their knowledge; the result being, in my opinion, a necessity for a new trial, better conducted in these respects, to enable the doing of justice with some degree of satisfaction and certainty.

The plaintiff alleged, and went to trial upon allegations of, negligence in five respects only:—

1. In running the east-bound train on the west-bound track;

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2. In the man being killed while conforming to the orders of his foreman, to whose orders he was bound to conform;
3. In failure of the foreman to protect the man in a dense fog;
4. In failure to apprise the man of the fact that an east-bound train was running on a west-bound track; and
5. In failure of those in charge of the train to give warning of its approach.

The first four of these allegations are quite crude, and obviously insufficient to support an action.

As to the first allegation, it is not, in itself, negligence to run an east-bound train on a west-bound track or *vice versâ*; it may sometimes be necessary to do so. In order to make out a case of negligence, it must be proved that it was negligently so run.

The second, too, quite fails to disclose any cause of action; there is no allegation of anything negligent on the part of the person who gave the order, whose negligence is the very essence of a cause of action in this respect. For all that is alleged, the accident might have been caused through the fault of the man himself, or without fault on the part of any one.

So, too, of the third. There is no allegation of the manner in which the man should have been protected; it, like the other allegations with which I have dealt, is altogether too crude and uncertain to disclose any kind of a right of action. It was suggested here that the foreman might have put a torpedo on the west-bound track west of the place where the men were working; but that goes very near to saying that the men were negligent in remaining at work after hearing the whistle and the noise of the coming train, as they all did for some time before the accident. If there be such a known danger that a torpedo should be placed, it is surely such a known danger that the men should step off both tracks when it is impossible to see a train before it is upon them.

In regard to the fourth, I know of no duty such as that alleged; indeed, it would be manifestly absurd to say that, before so running a train, the company was bound to hunt up all its section-men in all the sections through which it was to be so run, and to inform them of the fact.

The fifth allegation might have afforded a good cause of action, if proved at the trial; but, on the contrary, it was plainly disproved, and the jury were against the plaintiff in this respect.

But also, in all these respects, the plaintiff failed with the jury, as was to have been expected; they, however, found for her on two other grounds not alleged in the pleadings: (1) because the train was not crossed over to the east-bound track at Lyn; and (2) because it was being run without a head-light.

It is, however, impossible to support the judgment in appeal on the first ground, even if there had been proper allegations of it in the pleadings, so that the defendants might have come down to trial prepared to meet it; and the trial Judge was of this opinion. Nothing is really proved as to the cause for the train taking the west-bound track, nor is it shewn that it safely and properly could have taken the east-bound track at Lyn, and continued upon it; nor is it even shewn, in any way, that the "cross-over" at Lyn is west of where the man was killed. The onus of proof in these respects was upon the plaintiff, and she really made no attempt to prove them. It is true that the essential knowledge was largely in the defendants' servants or officials; but it might have been extracted by the usual processes of discovery.

The finding in regard to the head-light is not based upon allegation, or upon any case made at the trial, respecting it; it is really based only upon the following few words which happened to come out, incidentally, in the examination of one of the witnesses, and was not even referred to in the cross-examination: "Q. Did you see any head-light on the engine? A. I did not see none at all. Q. Were you in a position where you could have seen the head-light if there was one? A. Yes."

An extraordinary thing to base a judgment for \$1,500 upon, even if the action had been brought, or the parties had gone down to trial, upon this ground.

There is evidence upon which a reasonable jury might find negligence in running this train without a head-light, and that it was so run; but there is not a particle of evidence that such negligence was the cause of the accident; it was not even suggested in the evidence; but the few words of testimony which I have quoted were caught at as a straw, when all the grounds

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upon which the action was brought were failing. The learned trial Judge said that in this respect the jury were in as good a position as he was for determining the question; and that, of course, was quite true, but the difficulty is, that neither could really know anything about it; and so neither was in a position to attempt to determine it. Only those to whom experience has taught the effect of a head-light, on a double-track line, in a dense fog, in the daylight, could know really anything about it, and not one person in ten thousand has had any such teaching. I am in a dense fog of ignorance as to such effect, for want of experience, and I decline to let a denser fog of conceit make me oblivious to the fact; and I purpose putting the jury on the same plane. To assume that the purposes of a railway company's rule requiring its servant to have a head-light burning in a fog, or when it is dark, is to intimate to section-men which track the engine carrying it is running on, is a quite unwarranted assumption; its main purpose is the protection of the engine and train against obstructions upon the track, broken rails and open switches and other like dangers; it is also, of course, to give warning of the approach of the train. But whether, in the circumstances of this case, it would have given an indication of the track it was running upon at any distance, even from a point of observation, as I have said before, I doubt if one man in ten thousand really knows. Much less could any one, without experience, really know whether it would have any effect upon men so self-satisfied that the train was on the east-bound track that not one of them took the trouble to look, although they heard the whistle a long way off, and heard the increasing sound of the heavy on-rushing train, until struck by it, if two of them really looked, even, then.

It is said that the jury may draw inferences from the facts proved; of course they may, in a measure; though I would rather put it that they may act upon proper presumptions of fact; but the jury may not draw upon their imaginations; nor supply facts which ought to be proved under oath.

I have no desire to detail things which are elementary; but sometimes that is necessary; and, upon this subject, that seems to me to be the case: I shall, therefore, read from one or two standard text-books the rule as it long has been.

"Presumptions of fact . . . differ from presumptions of law in this essential respect, that while presumptions of law are reduced to fixed rules, and constitute a branch of the system of jurisprudence, presumptions of fact are derived wholly and directly from the circumstances of the particular case, by means of the *common experience of mankind*, without the aid or control of any rules of law. Such, for example, is the inference of guilt, drawn from the discovery of a broken knife in the pocket of the prisoner, the other part of the blade being found sticking in the window of a house, which, by means of such an instrument, had been burglariously entered:" Taylor on Evidence, 10th ed., sec. 214.

"Evidence is usually required to be on oath. In accordance with this principle, although each jurymen may apply to the subject before him the *general knowledge which every man must be supposed to have*," yet personal knowledge must be given on oath before it can be acted upon: *ib.*, sec. 1379.

"In general, the jury may in modern times act only upon evidence properly laid before them in the course of the trial. But so far as the question is one upon which *men in general have a common fund of experience and knowledge, through data notoriously accepted by all*, the analogy of judicial notice obtains to some extent, and the jury are allowed to resort to this information in making up their minds. . . . But the scope of *this doctrine* is narrow; it is *strictly limited to a few matters of elemental experience* in human nature, commercial affairs, and every-day life:" Wigmore on Evidence, sec. 2570.

And the impropriety of deciding cases upon one's own notions, or own knowledge, instead of upon the evidence adduced at the trial, is pointedly dealt with in the modern case of *Kes-sowji Issur v. Great Indian Peninsula R.W. Co.* (1907), 96 L. T.R. 859.

It seems that, at one time, the jury were allowed to give much greater effect to their own personal knowledge, as much as has sometimes been allowed in the Courts here, but that was in the middle ages or thereabout.

It is certainly not in the category of elemental experience that in a dense fog in the day-light the head-light of an engine would have conveyed to these unfortunate workmen the fact

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that the train was running on the east-bound track, and have conveyed it in time to save them from their self-satisfied assurance that it was, as usual, on the other track, though the sound of the on-coming train and the knowledge that it might possibly be on the east-bound track failed to do so. Whether at all, or how far away, the head-light would shew, even to one looking for it, upon which track the engine was running, are certainly not things included in the saying, "*Manifesta probatione non indigent*;" to complement which it is proper to add "*Non refert quid notum sit judici, si notum non sit in formâ judicii*."

But, if the jury have the power to do that which was done in this case—both supply the facts and then draw the inference—it is hardly fair to make them take the oath to give a true verdict "according to the evidence:" it would be but fair to add to it "or your own knowledge or conceit."

I would allow the appeal, set aside the judgment and verdict, and direct a new trial.

*Appeal dismissed; MEREDITH, J.A., dissenting.*

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Jan. 24.

[DIVISIONAL COURT.]

PARSONS V. CITY OF LONDON.

*Municipal Corporations—Sale of Municipal Lands—Statutory Authority—1 Geo. V. ch. 95, sec. 10—Position of Council in Making Sale—Trustees—Precautions—Absence of Fraud.*

The judgment of MIDDLETON, J., ante 172, was affirmed.

APPEAL by the plaintiff from the judgment of MIDDLETON, J., ante 172.

January 23 and 24. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

N. W. Rowell, K.C., and C. G. Jarvis, for the plaintiff, contended that the City of London Act, 1 Geo. V. ch. 95, sec. 10, did not authorise the inclusion in the attempted sale of city hall property of the portion of "Covent Garden Market" in-

volved therein: *Western Counties R.W. Co. v. Windsor and Annapolis R.W. Co.* (1882), 7 App. Cas. 178; *Roe v. Lidwell* (1860), 11 Ir. C.L.R. 320. The municipal council did not take the steps incumbent upon it as trustee to obtain a fair and full price for the property, and was guilty of a breach of trust in that regard: *Phillips v. City of Belleville* (1905), 9 O.L.R. 732; *Dance v. Goldingham* (1873), L.R. 8 Ch. 902; *Attorney-General v. Goderich* (1856), 5 Gr. 402.

*T. G. Meredith*, K.C., for the defendants the Corporation of the City of London, and *J. B. McKillop*, for the defendants the Royal Bank of Canada, were not called upon.

January 24. The judgment of the Court was delivered by FALCONBRIDGE, C.J. (*v.v.*):—This case is of some public importance. I think the appeal should be dismissed. As to the first branch of the appeal, namely, that the City of London Act, 1911, did not authorise the inclusion in the sale of the city hall property of the portion of "Covent Garden Market" involved therein: but for the ingenious and persistent argument of the plaintiff's counsel, I should not have thought that the point was arguable. The statute gives power to sell this very parcel, defining it, so as to place the matter beyond doubt, as 55 feet of lot No. 11 on Dundas street and 55 feet of lot No. 11 on King street. As to the second branch, namely, that the sale was made by the council, who are of course in a fiduciary position as regards the rate-payers, without observing the precautions which as trustees they should have observed, I think the learned trial Judge has stated the law well, when he says that the Courts will not sit as an upper chamber of the municipal council, and interfere with the action of the people through their elective representatives, unless fraud is shewn.

The appeal must be dismissed with costs.

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## [DIVISIONAL COURT.]

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SINGER V. RUSSELL.

*Principal and Agent—Agent's Commission on Sale of Land—Absence of Express Contract of Agency—Implied Promise—Taking Benefit of Plaintiff's Services—Parties Brought together by Agent's Intervention—Finding of Trial Judge—Appeal.*

Where a claim is made for commission on a sale of land, slight service in bringing the parties together is sufficient; it is for the jury (or a Judge trying the case) to say whether the sale was or was not brought about by the agency of the plaintiff, by his introduction or intervention; and the test is, whether the sale has been brought about in consequence of the introduction, and is traceable thereto.

The plaintiff, who was a land agent, learned that B. would like to buy the defendant's land. The plaintiff told B. that he was an agent, and would see the defendant and find out the price. He did not go to buy the place for B. He saw the defendant, who told him to get an offer and he (the defendant) would consider it. The plaintiff prepared a written offer of \$7,000, which was signed by B., and in which the plaintiff's name was mentioned as agent. The plaintiff took this to the defendant, and the defendant had it in his possession for some days, while he was considering it, and in the end refused it, telling the plaintiff he wanted \$8,000, and he gave the plaintiff four days to get it. The plaintiff returned to B., but did not succeed in getting B. to give him another offer. B. himself went to the defendant within the four days and purchased at \$7,500. The defendant did not admit speaking in any way to the plaintiff about commission; but it appeared that the defendant, when he told the plaintiff he wanted \$8,000, had in mind the payment of a commission to the defendant:—

*Held* (RIDDELL, J., dissenting), that the plaintiff was entitled to commission on the sale-price.

Judgment of DENTON, Jun. Co.C.J. York, affirmed.

*Per* BOYD, C.:—There was no express bargain about commission, according to the evidence of both parties; but, on the plaintiff's evidence, there was proof that he was working upon an implied promise of compensation; and the defendant took the benefit of what was done by the plaintiff in preparing the way for the final sale; and the plaintiff's intervention efficiently furthered the completion of the transaction.

*Per* SUTHERLAND, J.:—The plaintiff proved facts from which it could be fairly and properly inferred that the defendant, knowing that the plaintiff was an agent, placed the property in his hands on an implied promise to pay him a commission if a sale were effected through his acts; and it was through the plaintiff and his activity in the matter that the purchaser was introduced to the defendant and the sale ultimately effected.

*Per* RIDDELL, J.:—The only contract of agency between the plaintiff and defendant was that created on their last interview, when the plaintiff said, "Bring me an offer of \$8,000 within four days, and I shall accept." The plaintiff shewed by his conduct that he so understood it; he made every effort to get B. to make an offer of \$8,000, but failed. Where the parties have made an express contract, the conditions under which the remuneration becomes payable must be ascertained by the terms of the contract itself. There was no pretence that the plaintiff did procure the offer or could procure it. There was no fraud or bad faith on the part of the defendant.



APPEAL by the defendant from the judgment of DENTON, Jun.Co.C.J., in favour of the plaintiff, an estate agent, for the recovery of \$187.50, in an action brought in the County Court of the County of York to recover a commission on the sale of land for the defendant.

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January 10. The appeal was heard by a Divisional Court composed of BOYD, C., RIDDELL and SUTHERLAND, JJ.

*Donald Macdonald*, for the defendant. The defendant did not, by express or implied contract, retain the plaintiff as his agent to sell the property in question. The only contract made by the defendant with the plaintiff was, that, if the plaintiff brought the defendant an offer of \$8,000 for the property within four days, the defendant would accept the offer and pay a commission thereon. The plaintiff did not do so. The plaintiff was the agent of the purchaser, and not of the defendant. The plaintiff did not bring the purchaser and the defendant together; on the contrary, the plaintiff intercepted the purchaser, who was seeking the defendant with a view of purchasing the defendant's property. If an implied contract arose by reason of the action of the plaintiff and defendant, the same was superseded by the express contract which I have mentioned.

*J. M. Ferguson*, for the plaintiff. There was an implied contract between the plaintiff and the defendant that the latter should pay the former a commission; and the trial Judge rightly so found. The plaintiff brought the purchaser and the vendor together; and, while the plaintiff did not complete the transaction, yet he is entitled to his commission, as there was an implied promise at least by the defendant to pay a commission upon the sale being effected, directly or indirectly, through his agency: *Calloway v. Stobart Sons and Co.* (1904), 35 S.C.R. 301; see judgment of Davies, J., at p. 306. I submit that before the express contract in regard to a sale at \$8,000 was made, there was an implied promise to pay the agent a commission; and I contend that the defendant cannot avail himself of the plaintiff's efforts to secure this purchaser without paying him for his labour: *Morson v. Burnside* (1900), 31 O.R. 438; *Aikins v.*

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*Allan* (1904), 14 Man. L.R. 549; *Burchell v. Gowrie and Blockhouse Collieries Limited*, [1910] A.C. 614; *Stratton v. Vachon* (1911), 44 S.C.R. 395.

*Macdonald*, in reply, referred to *Barnett v. Isaacson* (1888), 4 Times L.R. 645; *Locators v. Clough* (1908), 17 Man. L.R. 659.

January 24. *Boyd, C.*:—One Black, a tenant of the corner lot (Queen street and Logan avenue), called attention to the lot in conversation with Bedelli, who became the purchaser, and told him who was the owner and about an attempt to buy it. This was about a month before the transaction now under consideration, and is not connected with the present transaction. The plaintiff, who is a land agent and collected rent from Bedelli, fell into conversation with him about the 24th October, 1910, about the desirability of his purchasing this lot, and finally said to Bedelli that, as he was a land agent, he would try to interview the owner (the defendant Russell) and find out the price of the property. He did not go to buy the place for Bedelli, nor was he so commissioned. Bedelli asked Singer what would be the expense to buy the lot, and Singer said it would be \$10 or \$15 for the lawyer.

At the first interview, Singer says, he told Russell that he was a land agent, and asked him if he would sell, and how much he would ask for the lot. The defendant would not give a stated price, told him of people that had been after the property, and told him of prices that had been offered him, and told the plaintiff to go and get an offer and he would consider it. The defendant appeared anxious to sell and said he would sell if the plaintiff were to give him a satisfactory offer.

(1) The defendant's version of this first conversation was, that he was not particular about selling, that he did not know Singer was an agent, but thought he was buying for himself, but admits saying, "Make me an offer for the property, no matter what it is."

(2) Two days or so after, occurred the second interview with the defendant. Meanwhile Singer told Bedelli that Russell wanted an offer, and one was prepared in which \$7,000 cash was offered by Bedelli under his signature, witnessed by Singer as agent. This is in the usual printed form, filled up in writing

as to the blanks, and is dated the 26th October, 1910. This offer was handed to the defendant and by him retained for some days, which he asked for its consideration, and was refused by him after that interval. What occurred on the second occasion is thus given by the plaintiff: "Russell noticed 'commission' marked on the printed offer, and he said, 'I suppose you expect commission?' I said, 'Yes, I expect the regular two and a half per cent.' I left offer with him and went away." The defendant does not appear to recall this conversation, and I do not find that he specifically contradicts it.

(3) The third interview was when Singer returned after the three days, and he gives the details thus: "Russell refused the \$7,000 and said it was not enough. I said, 'How much do you want?' and he said, 'I want \$8,000.' I said, 'I would like to get it for you: I am working in your interests and I would like to be able to put it through for you.' I said I would go and see my man again and see if he would make it \$8,000. Before I left, he said, 'Well, I will give you four days to get the \$8,000 for it.' " In cross-examination the plaintiff puts it thus: "Fetch me an offer within four days for \$8,000, and I will accept it." The defendant's version is different of this third meeting. He says: "The plaintiff pressed me to put a price on it, and by looking over the document (offer) I saw he was an agent and I pay the commission, and I asked \$8,000 for the property. I did not know he was an agent up to that time, of course. . . . I gave him four days to find me a purchaser." The plaintiff says that agency and commission were spoken of at the first and second meeting. The defendant does not admit speaking in any way to the plaintiff about commission.

I may say that, on reading over the evidence, I am not favourably impressed with the way in which the defendant's evidence was given; and I would accept the recollection of the plaintiff and his witnesses as against the defendant's contradictions.

The plaintiff forthwith returned to Bedelli, but could get no definite result within the four days. He went to Bedelli three or four times and tried to induce him to give a higher offer. Bedelli said he would give the plaintiff an offer for perhaps

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\$7,500, but did not feel inclined to give \$8,000. On the night of the 8th November, Bedelli was to call the plaintiff up to let the plaintiff know if he would give an offer to take to Russell; but, before then, Bedelli had gone directly to Russell and purchased at \$7,500. Bedelli was going to give an offer for \$7,500 to the plaintiff, but he did not do it, and, instead of that, he closed directly with the owner.

When Singer saw Bedelli about increasing his offer, Bedelli said he would have to think it over, and then, in conferring with the other Bedelli, his brother (who was called as witness), he came to the conclusion to go and speak to Russell. Bedelli says: "I went to see Russell to see what kind of idea he got, if he want to sell or not, to see if I would do any better myself, a little better myself."

Both brothers Bedelli agree in their account of what was said by them, and the defendant, Russell, said: "Are you the one that Singer got the offer from?" "I said, 'yes.' I said, 'What do you want for the property?' And he says, '\$8,000.' I said, 'I will give you \$7,500,' and Russell said, 'How about the commission? Who is going to pay the commission to Singer?' I said, 'I don't know about the commission,' and he said, 'Didn't Singer ask you for commission?' I said; 'No, he only asked \$20 for the lawyer.' Then Russell said: 'Well, I think I will sell it to you, and if I have to pay the commission I will pay it; but if not, I won't.' "

The written offer was for \$7,000, \$100 cash and the balance in cash on completion. What was accepted was \$7,500, \$100 paid down, \$2,500 on mortgage, and balance cash. The defendant's account varies from that of the Bedellis. He says: "I asked, 'Are you paying Singer anything for carrying on this business for you?' And they said they were paying him something—I can't just remember the amount they told me. No lawyer's fee was mentioned by Bedelli at all. I did not know till after the sale that Bedelli was the man Singer had been speaking to me about. I did not consider I had anything to do with Singer. If Singer had got me \$8,000, I understood then I would have paid him." This sale took place about the 7th or 8th November.

It appears that the defendant, after the four days given to

get the \$8,000 offer were up, and before the 8th November, sold to the Bank of Toronto, and the way it is stated by him is significant. I quote his language: "In the meantime, after they failed to come up with the offer of \$8,000, I sold it to the Bank of Toronto, and then I got a letter from the manager, stating that the Board considered it a little too far west. I was mad that night they came up, or I would not have sold it."

Next morning after the sale, Singer went to the defendant and asked for his commission, and the defendant said he had put through the sale himself, and so refused to pay.

I cannot doubt that the defendant knew that Singer was a land agent from the time they first met in this transaction, and he then employed the plaintiff to get him an offer, saying he would sell if he got a satisfactory offer. Nor can I doubt that on the second occasion, when the offer of \$7,000 was submitted, there was a talk about commission, and that the plaintiff told the defendant that he expected to get it at the regular rate which was mentioned. On the third occasion, the plaintiff was told to fetch an offer at \$8,000 in four days, and it would be accepted. It was, of course, open for the defendant to sell otherwise after the lapse of the four days, and this he did to the Bank of Toronto—but this sale came to nothing, almost at its inception.

Next comes the present purchaser Bedelli in person, whose coming is naturally and reasonably attributable to the previous intervention and negotiation of Singer. The owner appreciated the situation and realised the connection by agitating the question of commission with the Bedellis, but resolved to get out of it if he could.

The plaintiff was still labouring the matter with Bedelli and had got him up to the point of \$7,500; and, had that been put in writing and carried to Russell, there would have been no peradventure as to the right to commission. But, apart from this method of dealing, Singer brought the vendor and purchaser together, and practically introduced a willing purchaser to the owner and at the owner's request.

The owner first fixed a definite price on this third occasion, but that did not displace the employment of the agent to get a satisfactory offer. The defendant was ready to sell at \$7,500, and the purchaser was willing to give it, and the sale made

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between the two was clearly traceable to the exertions of Singer, whose "man" made the satisfactory offer in person, instead of putting it into writing and letting Singer carry it to the vendor.

There is made out from these interviews an implied contract to pay the agent commission for his effective services, and no difficulty arises about any express contract ousting the operation of the implied contract. The reference to express contract arises from an inadvertent misquotation of the evidence by the Judge. He has confounded question with answer, as will appear by quotation. On the examination of the plaintiff, he is asked: "And he said to you, 'You bring me an offer for \$8,000 within four days and I will pay you a commission'? Is that what was said?" Answer: "No, he did not say, 'I will pay you a commission;' he said, 'Fetch me an offer of \$8,000 within four days, and I will accept it.' " There was no express bargain about commission, according to the evidence of both parties; but, on the plaintiff's evidence, there is clear enough proof that he was working upon an implied promise of compensation. This being so, the defendant takes the benefit of what was done by the agent in preparing the way for the final sale, and whose intervention efficiently furthered the completion of the transaction.

Slight service in bringing together the parties so as to result in a sale is sufficient: *Mansell v. Clements* (1874), L.R. 9 C.P. 139, *per* Keating, J., at p. 143. It is for the jury (or a Judge trying the case) to say whether the sale was or was not brought about by the agency of the plaintiff, by his introduction or intervention: *Lumley v. Nicholson* (1886), 34 W.R. 716. The principle of the decision in *Re Beale, Ex p. Durrant* (1888), 5 Mor. 37, is applicable in its facts, where the test is explained by Mr. Justice Cave to be, whether the sale has been brought about in consequence of the introduction, and is traceable thereto.

The learned trial Judge has come to the conclusion, upon the evidence, in favour of the plaintiff; there is evidence well warranting this result; and I think his judgment should be affirmed with costs.

SUTHERLAND, J.:—An appeal from a judgment of Denton, County Court Judge, York, dated the 9th November, 1911, in

favour of the plaintiff, a real estate agent, for the sum of \$187.50, for commission at two and a half per cent. on \$7,500, on a sale by the defendant to one Bedelli of real estate on Queen street, in the city of Toronto.

Some weeks before the 24th October, 1910, Bedelli had casually learned through one Black, the tenant of the property, that the defendant owned it and the price at which he had offered to sell it to the latter. It did not appear in evidence at the trial what this price was. Neither Bedelli nor Black, however, approached the defendant about the matter. On that date, the plaintiff, being in Bedelli's fruit store in Parliament street, was asked by him what he considered the value of the property in question, and gave his opinion. Seeing the apparent interest of Bedelli in the matter, he suggested that he would see the owner and ascertain his price. He called on the defendant, and says that he introduced himself by name and stated that he was an agent. He also says that the defendant did not, on this occasion, wish to give him a price upon the property, but told him to go and get an offer and he would consider it. Thereupon the plaintiff returned to Bedelli and secured a written offer, from which I quote in part: "Offer to Purchase. To John Russell, I, Mr. Bedelli, of the city of Toronto (as purchaser), hereby agree to and with John Russell (as vendor) through J. Singer (agent) to purchase all and singular the premises situate on the north side of Queen street," etc., at \$7,000. "This offer to be accepted by the 29th day of October, 1910, otherwise void," etc.

It was signed by S. Bedelli, and witnessed by J. Singer, the plaintiff. Below Bedelli's signature, the following is printed: "I hereby accept the above-named offer and its terms and covenant, promise and agree to and with the said to duly carry out the same on the terms and conditions above-mentioned, and also agree with said agents to pay them the usual commission." He returned to the defendant, handed the offer to him, and asked him if he would accept it. The plaintiff's version of what then happened is as follows: "Well, I don't think that there was very much conversation took place at that time. He said he wanted a few days to consider it and told me to come back. He read it over and he noticed the commission

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marked upon it and he said, 'I suppose you expect commission.' I said, 'Yes, I expect the regular two and a half per cent.' "

The offer was left with the defendant, and the plaintiff returned in a few days, when the defendant told him it was not enough money for the property. He was asked how much he wanted, and answered, "\$8,000." Before the plaintiff left him on this occasion, he states, the defendant put it in this way: "Well, I will give you four days to get the \$8,000 for it."

The plaintiff went back to Bedelli, and what then occurred between them is told by him as follows.

Being asked at the trial if he had secured an offer for that amount, he says: "A. Not within that four days. I had been to him three or four times trying to induce him to give me an offer; he said that he would give me an offer for perhaps \$7,500; that he did not feel inclined to give \$8,000.

"Q. Then what next took place? A. Well, on the night of the 8th Mr. Bedelli was to call me up and let me know whether he would give me an offer for something to take to Mr. Russell, and it seems that he had already gone to Mr. Russell.

"Q. Now, have you asked Mr. Russell for this commission? A. I went there the day after the sale, the next day that Mr. Bedelli had been to Mr. Russell—the next morning. I went to Mr. Russell, and asked him for the commission.

"Q. What did he do or say? A. Well, he said that he had put through the sale himself.

"Q. Did he tell you to whom he had sold the property? A. Mr. Bedelli; he mentioned his name to me at the time.

"Q. What did he say? A. He said he thought he had put through the sale himself."

Again he says:—

"Q. You never brought Mr. Russell any offer for over the \$7,000? A. No, although I tried to get an offer; I was to Mr. Bedelli about four or five times, trying to fetch it up to the \$8,000.

"Q. You could not raise the other offer? A. He was going to give me an offer for \$7,500.

"Q. He did not do it? A. He did not give it to me.

"Q. Why did you not get the offer for \$7,500 when you were there with him? A. Well, it was simply a matter of not exactly



making up his mind in such a hurry; I could not hold him; he wanted a few days to consider it himself; I thought perhaps I might be able possibly to get \$8,000 from him. I tried my best to get \$8,000 for it so that I would be able to go there and Mr. Russell would not refuse."

The purchaser, Salvador Bedelli, was called on behalf of the plaintiff, and says:—

"One night Mr. Singer happened to come over to my place, you know to buy some fruit—I ain't sure—buy fruit or get rent, I ain't sure which—and we started talking about property and we said to Mr. Singer—I said to Mr. Singer, 'What do you think about this corner of Queen and Logan?' He said, 'That is a nice property,' and he said, 'Have you any idea to buy?' I said, 'Yes, if the price suit me, I think I get a notion to buy.' He says, 'Well, I am an agent,' and I said, 'I know.' 'Then I go and see the owner,' Mr. Singer said. I said myself to Mr. Singer, I said, 'What will the expense will cost me to buy the property,' and he told me \$15 or \$20 for the lawyer, and that is all, he told me." He corroborates the plaintiff about giving him a written offer to take to the defendant at \$7,000; about the plaintiff returning and saying that the defendant wanted a few days to think it over, and coming back again and telling him that he would not accept \$7,000 and wanted \$8,000. He then states that a night or two afterwards he thought he would go and see Russell himself, and in company with his brother did so, whereupon the following conversation, he says, occurred:—

"And I went over to Mr. Russell, and soon as we get into Mr. Russell and Mr. Russell tell me, he says, 'Are you the one that Mr. Singer got the offer from?' I say, 'Yes.' He say, 'Well'—you see Mr. Russell tell Mr. Singer he won't accept the \$7,000, so I said, 'What do you want for the property?' and he says, 'I want \$8,000;' and then I say, 'I think that is a little too much.' So I say, 'I will give you \$7,500.' And then Mr. Russell say, 'How about the commission?' He says, 'Who is going to pay the commission to Mr. Singer?' I said, 'I don't know about the commission.' And he said, 'Didn't Mr. Singer ask you for any commission?' And I said, 'No;' I say, 'Mr. Singer only ask me \$20 for the lawyer'—because I ask him that myself,

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you see, what the expense will be. And he says then, 'Well, I think I will sell it to you.' And he put his hand upon his head, and he say, 'I think I will sell it to you, and if I have to pay commission I will pay it, and if not I won't.' That is what Mr. Russell told me."

"Q. And did you buy the property from him for \$7,500? A. Yes, and I give him a deposit of \$100."

Joe Bedelli, a brother of the purchaser, was called, and he corroborated in detail his brother's testimony as to what was said at Russell's on the occasion when the sale for \$7,500 was made.

The defendant denied that the plaintiff had told him, on the first occasion when he saw him about the property, that he was an agent, and says that he was not aware of this until after the written offer from Bedelli at \$7,000 was left with him, when he saw it stated on its face. It seems rather extraordinary that, when the very object which the plaintiff had in going to the defendant was to try and effect a sale of the defendant's property and secure a commission from him, he should not have disclosed the fact to him. It also seems curious that, on receiving from the plaintiff Bedelli's written offer, he should not have looked it over before asking for a few days to consider it. He must, I think, be assumed to have done so, and to have then discovered, if he did not know before, as I think he did, that the plaintiff was an agent and that the question of commission would arise. It would also look as though he then had in mind to sell at a price not greatly in excess of \$7,000, or he would at once have told the plaintiff he would not sell at that figure and not taken some days to consider the matter. The defendant, however, puts it in this way: "A. Well, he went away; and, I think a day or so after, he came back with an offer and he had on the offer it gave me three days to consider it; so, after the three days was up, he came back and I told him I could not accept his offer, and he pressed upon me to put a price on the property, and by me looking over this document I saw that he was an agent and I pay the commission, and I asked \$8,000 for the property; I did not know that he was an agent up to that time, of course."

The defendant also says that, when the sale was finally made to Bedelli, the following conversation occurred:—

"I asked him, 'Are you paying Singer anything for carrying on this business for you?' and they said they were paying him something—I cannot just remember the amount now, but they told me though; I did not consider that I had anything to do with Singer.

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"Q. That is after the sale was made? A. Yes, and I would not back out of it.

"Q. You have heard what the Bedellis have said about your paying the commission? A. Yes; I never mentioned anything—there was no mention of the commission to nobody—but, if Singer had got me \$8,000, I understood then I would have paid him.

"Q. There was no mention of commission at that interview? A. Well, I asked him who was going to pay Singer, and they said they were paying him something; they did not say what the amount was at all."

And then again the defendant states:—

"Q. And, when you sold the property to the Bedellis, you knew that these were the men that Mr. Singer had been speaking to you about? A. I did not know until after I had sold the property."

And again, on the cross-examination of the defendant:—

"Q. You see what these Bedellis say is, that, when they went there that night, you said to them, 'Are you the men that Singer got the offer from?' A. There was nothing of that mentioned at that stage of the game.

"Q. Well, that is what they both swear to? A. I cannot help what they swear to."

The learned trial Judge has found, in his judgment, as follows: "The plaintiff then asked him to place a price upon the property, and the defendant said, 'Bring me an offer within four days of \$8,000 and I will accept it and pay a commission.'"

I do not find anywhere in the evidence anything to support the statement that the defendant said "and pay a commission." Neither the plaintiff nor the defendant says this. The plaintiff, on the contrary, says:—

"A. No, he did not say, 'I will pay you a commission.' He said, 'Fetch me an offer of \$8,000 within four days and I will accept it.'"

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And the defendant says: "And by me looking over this document I saw that he was an agent and I pay the commission, and I asked \$8,000 for the property; I did not know that he was an agent up to that time, of course. Q. Did you give him any period within which to find you a purchaser for the property? A. Four days." At p. 25: "Q. So that, as I understand it from your evidence, if \$8,000 had been procured for the property, you were quite willing to pay a commission? A. That is correct?"

The trial Judge says:—

"The evidence of the plaintiff and Bedelli, coupled with the fact that the defendant had the first written offer in his possession for more than a week before the sale was made, and that this offer mentioned the plaintiff's name as an agent, convince me that, when the defendant sold direct to Bedelli, he knew that Bedelli was the man who had been introduced to him by the plaintiff through the first offer, and the man to whom the plaintiff had been trying to effect a sale.

"The weight of evidence, I think, is also in favour of the view that, on the day on which the sale was actually made, there was some discussion about the plaintiff's commission; so that, when the defendant made the sale to Bedelli, he knew that there might be some claim made to commission. I am inclined to think that the defendant then concluded that, as the plaintiff had not brought the offer within the four days that he had mentioned, he was not liable for the commission, and that in any event he would take the chance.

"Is the plaintiff, on these facts, entitled to his commission? I am of opinion that he is. A contract for the payment of commission may be implied from the conduct of the principal or from the circumstances of the particular case.

"When the plaintiff first saw the defendant, and the defendant told him to bring an offer and he would consider it, there was, I think, an implied promise on the part of the defendant that, if the plaintiff brought him an offer which he accepted, or brought about a sale, the defendant would pay him a commission. The plaintiff brought the purchaser and the vendor together; and, while the agent did not complete the transaction, he is nevertheless entitled to commission if there was a

promise, express or implied, on the part of the defendant, to pay a commission upon the sale being effected directly or indirectly through his agency.

“The defendant’s contention is, that the only time the defendant ever agreed to pay him a commission was when the defendant said, ‘Bring me an offer of \$8,000 and I will accept it and pay a commission.’ It may be that that was the only time when an express promise was made; but, long before that, there was an implied promise to pay the plaintiff a commission; and, after an agent has been trying to negotiate a sale on such an implied promise, the defendant cannot, by express contract with more onerous terms, deprive the agent of his right to the commission. If, instead of the defendant saying, ‘Bring me an offer of \$8,000 within four days,’ he had said that he would have nothing further to do with the plaintiff and refused to pay him any commission, and the defendant afterwards sold to the man with whom the defendant knew the plaintiff had been negotiating, and whose name had been first introduced to the defendant as a purchaser, the defendant would clearly have been liable. And he must be equally liable when, instead of saying he would have nothing further to do with him, he, by express terms, fixed a price (\$500 higher than the price at which it was sold) on which he is willing to pay a commission. If these terms had been expressly mentioned at an earlier stage, before any implied promise to pay arose and before the plaintiff had done anything towards bringing the parties together, the defendant’s contention would be sound. But, on the facts of this case, I think the plaintiff is entitled to his commission.”

It seems to me that the plaintiff at the trial proved facts from which it could be fairly and properly inferred that the defendant, knowing that the plaintiff was a real estate agent, placed his property in his hands on an implied promise to pay him a commission if a sale were effected through his acts. It seems to me that it was through the plaintiff and his activity in the matter that the purchaser was introduced to the defendant and the sale ultimately effected. If it be true, as from the evidence and weight of evidence I think it is, that, before the sale by the defendant to Bedelli, he said to the latter, “Are

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you the one that Singer got the offer from?" he approached the negotiations with that in mind; and, if it be also true, as I think it is, that, before he completed the sale, he raised with the proposed purchaser the question of a commission to be paid to the plaintiff, by asking, as Bedelli and his brother say, "What about this commission?" or, as he himself puts it, "Well, I asked him who was going to pay Singer," etc., and learned that Bedelli was not paying any commission, then I do not wonder he should say "I will sell it," and "If I have to pay commission, I will pay it, and if not I won't."

As Clute, J., puts in in *Sager v. Sheffer* (1911), 2 O.W.N. 671, at p. 672: "The parties were brought together by his act; and the form of the agreement entered into by the defendant with the other agents clearly indicates that the defendant realised that the plaintiff had a claim for commission." So here, the conversation at the time of the sale plainly indicates that he realised the same thing.

It appears from the plaintiff's evidence that he was actually expecting to have an offer from Bedelli of \$7,500, which they had discussed, and which he hoped to obtain and submit to the defendant, when Bedelli, the purchaser, himself went and offered the defendant that price. The negotiations were not broken off. The purchaser himself called on the defendant, and the defendant continued them with him, knowing that he was the man introduced by the plaintiff as the intending purchaser. See *Morson v. Burnside*, 31 O.R. 438, at p. 442. Meredith, C.J.: "The case might have been different had negotiations been broken off when the parties left the office at which they had met. They were not, however, broken off, but what took place when the documents were executed was a continuation of the negotiations which had been begun owing to the plaintiff having introduced Moore as an intending purchaser, and the sale, which was finally made at the expiration of the year, was the direct result of those negotiations."

In *Wilkinson v. Martin* (1837), 8 C. & P. 1, it was held: "The broker will be entitled to his commission, if he was, up to a certain time, the agent or middle-man between the parties, although the contract be afterwards completed without his instrumentality or interference." And see p. 5, where Tindal,

C.J., says: "Undoubtedly a dry introduction of one man to another will not be enough: it would be absurd to say that it can be the subject-matter of such a claim as this. But if the introduction is the foundation on which the negotiation proceeds, and without which it would not have proceeded, then the parties cannot by their agreement deprive the brokers of their just remuneration. If the plaintiffs were the middle-men or agents up to a certain time, the parties cannot afterwards deprive them of their right."

In the present case, the introduction of the purchaser to the vendor, the defendant, was made by the plaintiff, and the latter's acts were, I think, what led to the sale.

In *Green v. Bartlett* (1863), 14 C.B. N.S. 681, an auctioneer and estate agent was employed to sell an estate, under an agreement by which he was to receive a commission of two and a half per cent. "if the estate should be sold," and, "in case the estate should not be sold," he was to be paid £25 as a compensation for his trouble and expense. Having put up the estate to auction, and failed to sell it, the agent, being asked by a person who had attended the sale who was the owner of the property, referred him to his principal; and ultimately that person, without any further intervention of the agent, became the purchaser. Held, that the sale having been effected through the means of the agent, he was entitled to the stipulated commission. Erle, C.J., at p. 685, said: "The question whether or not an agent is entitled to commission on a sale of property has repeatedly been litigated; and it has usually been decided, that, if the relation of buyer and seller is really brought about by the act of the agent, he is entitled to commission although the actual sale has not been effected by him. I think, the sale here having been brought about through the plaintiff's introduction, the plaintiff is entitled to the stipulated remuneration of two and a half per cent. on the amount of the purchase-money." And again *per* Williams, J., at p. 686: "And the evidence distinctly shewed that the sale to Hyde was the direct consequence of the plaintiff's act."

In *Wolf v. Tait* (1887), 4 Man. L.R. 59, "the plaintiff was employed by the defendant to sell for him certain lands upon certain terms. He found a man willing to purchase upon less

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advantageous terms. Held, that the defendant, having accepted the purchaser and ratified the variation of the terms, was liable for the plaintiff's commission." See also *Aikins v. Allan*, 14 Man. L.R. 549.

*Burchell v. Gowrie and Blockhouse Collieries Limited*, [1910] A.C. 614: "In an action by the appellant to recover an agreed commission on the proceeds of a sale of mining property by the respondent company the latter contended that he was not the efficient cause of the particular sale effected. Held, that as the appellant had brought the company into relation with the actual purchaser he was entitled to recover although the company had sold behind his back on terms which he had advised them not to accept." Lord Atkinson, at p. 625: "The answer to the second contention is, that if an agent such as Burchell was brings a person into relation with his principal as an intending purchaser, the agent has done the most effective, and, possibly, the most labourious and expensive, part of his work, and that if the principal takes advantage of that work, and, behind the back of the agent and unknown to him, sells to the purchaser thus brought into touch with him on terms which the agent theretofore advised the principal not to accept, the agent's act may still well be the effective cause of the sale. There can be no real difference between such a case and those cases where the principal sells to the purchaser introduced by the agent at a price below the limit given to the agent. . . . On this question of fact there was, their Lordships think, ample evidence to sustain the conclusion at which the referee presumably arrived, namely, that the appellant's acts were an effective cause of the sale which actually took place. In their Lordships' view it was the right conclusion, and the finding to that effect ought not, they think, to be disturbed."

*Stratton v. Vachon*, 44 S.C.R. 395: "Held, reversing, in part, the judgment appealed from (3 Sask. L.R. 286), that as the steps taken by the agent had brought the owner into relation with the persons who finally became purchasers he was entitled to recover the customary commission upon the price at which the property in question had been sold. *Burchell v. Gowrie and Blockhouse Collieries Limited*, [1910] A.C. 614, applied." The Chief Justice, at p. 399: "The property was brought



by Stratton to the attention of Moore, who was instrumental in inducing Millar and Robinson to consider it with a view to a purchase on joint account. The subsequent disappearance of Moore as purchaser before the transaction was finally completed did not operate to destroy the right acquired by Stratton through his original introduction of the property to one of the three associates, two of whom completed alone the purchase begun with and through the men to whom it was introduced originally and who had undertaken then to buy it or find a purchaser for it." Davies, J., at p. 401: "The *knowledge* on the part of the vendor that the person with whom he completes the sale was introduced by the agent is not the test of his liability to pay commission, but the fact whether the agent's acts have really been the effective cause of the sale, and if the agent's acts have brought a person or persons into relation with his principal as an intending purchaser, and the sale is effected, the agent has done what he contracted to do and is entitled to be paid." Anglin, J., at p. 410: "In my opinion the defendant has established that his introduction was the foundation upon which the negotiations which resulted in the purchase proceeded and without which they would not have proceeded."

A perusal of the evidence does not lead me to think the defendant was candid or reliable. He is expressly contradicted by the plaintiff as to when he first learned that the plaintiff was an agent; and, upon the evidence of each and the circumstances and probabilities of the matter, I would credit the plaintiff's version rather than his. He is also at complete variance with the Bedellis as to what occurred at the interview when the sale was concluded.

I would dismiss the appeal with costs and affirm the judgment.

RIDDELL, J. (dissenting):—The defendant was the owner of premises on Queen street, Toronto, of which one Black was tenant. Bedelli was carrying on business on Parliament street, and Black, passing Bedelli's shop one day, told him that the defendant's property would be a great corner for his business and he ought to buy it, and told him further that the defendant owned it, where he lived, and the price he asked Black for it—ap-

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parently \$8,000, although that does not expressly appear. This was about a month before the sale was made, and therefore about the end of September or the beginning of October. Nothing was done by Bedelli upon this information; and, on the 24th October, 1910, the plaintiff, who is a real estate agent, came into Bedelli's place, and in the course of conversation he (Bedelli) intimated that he might buy the property in question if he could get it at the right price. The plaintiff said, "Well, I am an agent," and Bedelli said, "I know." The plaintiff: "Then I will go and see the owner." The plaintiff then "went to Mr. Russell to find out whether he would sell it and also how much he would ask for it." The defendant was just about to leave his house; the plaintiff met him at the front door, and asked him if he would sell, and, if so, at what price. The plaintiff says he introduced himself as an agent—this the defendant denies, and says that he thought the plaintiff was buying for himself. The defendant refused to put a price upon the property, but told the plaintiff to bring him an offer and he would consider it. Nothing was said or suggested about any commission. Thereupon the plaintiff went to Bedelli and got him to sign an offer for \$7,000 cash. This offer reads: "I, Mr. Bedelli, of the city of Toronto (as purchaser), hereby agree to and with John Russell (as vendor) through I. Singer, agent, to purchase," etc., etc., "one hundred dollars in cash to the said agent on this as a deposit," etc., etc. On the 26th October this was taken by the plaintiff to the defendant, "who then said nothing more than that he wanted a few days to consider it." The plaintiff says that the defendant, noticing the commission marked on it, said, "I suppose you expect commission?"—but this the trial Judge discredits, as will be seen from the clause I have copied from his judgment. The defendant expressly says he did not know at that time that the plaintiff was an agent nor until he, when afterwards looking over the offer, saw that the plaintiff was described as an agent and that the vendor was expected to pay a commission. Up to that time he had thought that the plaintiff was buying for himself. The trial Judge does not discredit the defendant, but rather the contrary, as we have seen.

After three days or so, the plaintiff returned and was told

that the offer was refused. He urged the defendant to put a price upon the property, and at length—the learned trial Judge finds—the defendant said: “Bring me an offer within four days of \$8,000, and I will accept it and pay a commission.” The evidence, however, does not shew that any mention was in fact made of commission; but it is clear that the defendant impliedly agreed to pay a commission if the price mentioned was obtained.

The plaintiff tried to get Bedelli to offer \$8,000, but failed—and some six or eight days or perhaps more thereafter Bedelli went to the defendant. The defendant had sold to another purchaser, who declined to carry out the purchase, and he was “mad” and sold to Bedelli for \$7,500, \$5,000 cash and \$2,500 on a mortgage. The defendant asked Bedelli, “Are you paying Singer anything for carrying on this business for you?” and the purchaser said he was paying him something—and Bedelli says that the defendant said: “If I have to pay commission, I will pay and if not I won’t.” No doubt is cast by the trial Judge on the good faith of the defendant, and I can find no reason for any.

The learned Judge says further: “The evidence of the plaintiff and Bedelli, coupled with the fact that the defendant had the first written offer in his possession for more than a week before the sale was made, and that this offer mentioned the plaintiff’s name as an agent, convinces me that, when the defendant sold direct to Bedelli, he knew that Bedelli was the man who had been introduced to him by the plaintiff through the first offer and the man to whom the plaintiff had been trying to effect a sale. The weight of evidence, I think, is also in favour of the view that on the day on which the sale was actually made there was some discussion about the plaintiff’s commission; so that, when the defendant made the sale to Bedelli, he knew that there might be some claim made to commission. I am inclined to think that the defendant then concluded that, as the plaintiff had not brought the offer within the four days that he had mentioned, he was not liable for the commission, and that in any event he would take the chance.”

I have set out the facts as the learned trial Judge finds

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them where there is any conflict. On this state of facts, the plaintiff has been held in the Court below entitled to commission.

I think this case is covered by authority in a sense adverse to the judgment.

In *Toulmin v. Millar* (1887), 58 L.T.R. 96, in Dom. Proc., Lord Watson, says: "It is impossible to affirm, in general terms, that A. is entitled to a commission if he can prove that he introduced to B. the person who afterwards purchased B.'s estate, and that his introduction became the cause of the sale. In order to found a legal claim for commission, there must not only be a causal, there must also be a contractual relation between the introduction and the ultimate transaction of sale."

It is too often thought that the mere fact that a real estate dealer brings about a sale of property entitles him to a commission from some one; but it is clear that this is not the law. Of course, if the owner puts his land into the hands of an agent to sell, the law implies a contract to pay commission on a sale effected through the agent—and the most trifling services on the part of the agent have been recognised as making him the *causa causans* of a sale. "In ninety-nine case out of a hundred, the service performed by the house-agent upon these occasions is of the slightest possible kind: it consists for the most part in merely bringing the vendor and the purchaser together, so as to result in a sale. It is often done by a line written or a word spoken:" *per* Keating, J., in *Mansell v. Clements*, L.R. 9 C.P. 139, at p. 143. And see *Green v. Bartlett*, 14 C.B.N.S. 681.

But, if the owner, upon being asked whether he would sell, and, if so, at what price, does not put the property in the hands of the applicant as an agent at all, but simply refuses to put a price upon the property, and says, "Bring me an offer and I will consider it"—at the time supposing that the applicant is buying for himself—how can it be said that he thereby makes the applicant an agent for sale? It takes two to make a bargain, and a contract of agency requires two consenting minds, like every other contract.

When the defendant became aware that the plaintiff was an agent and was looking for a commission, as he did when he read

with any care the offer delivered to him on the 26th October, the aspect of matters was altered—he recognised that if the plaintiff brought him an offer which he accepted, he would claim commission; and thereupon he made the first and only contract of agency which he did make with the plaintiff—“Bring me an offer for \$8,000 within four days, and I shall accept;” and then he quite understood that he might have to pay commission.

If a contract of agency be considered as existing before this, the case would be not unlike *Toppin v. Healey* (1863), 11 W.R. 466. There the defendant employed the plaintiff to negotiate a loan on certain terms, and subsequently, before the loan was effected, changed the terms. The plaintiff endeavoured to procure the loan on the latter terms and failed; but he procured a loan on the original terms. It was held that he could not recover; the plaintiff had not done what he was to do under the substituted terms, and the former terms had been revoked. Williams, J., points out (p. 467): “The letter of the 17th (containing the altered terms) amounted to a revocation. The plaintiff might have brought an action for the breach of contract, but he does not, but assents to the substituted terms. Then he has not earned that which he agreed for . . .” And Willes, J.: “If the plaintiff chose to treat the letter of the 17th as a breach of contract, he ought to have done so at the time. But he did not choose to do so.” Erle, C.J., and Keating, J., agreed.

In my view, the only contract of agency between the plaintiff and defendant was that created on their last interview. The plaintiff shewed by his conduct that he so understood it—he made every effort to get Bedelli to make an offer for \$8,000, but failed.

Where the parties have made an express contract, the conditions under which the remuneration becomes payable must be ascertained by the terms of the contract itself: *Barnett v. Isaacson*, 4 Times L.R. 645; *Green v. Mules* (1861), 30 L.J.C.P. 343; *Alder v. Boyle* (1847), 4 C.B. 635.

Of course, if what the agent has been employed to do, he does in substance, that is enough: *Wycott v. Campbell* (1871), 31 U.C.R. 584; *Rimmer v. Knowles* (1874), 22 W.R. 574, 30 L.T.

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R. 496; *Johnston v. Kershaw* (1867), L.R. 2 Ex. 82; *Morson v. Burnside*, 31 O.R. 438; but not otherwise. There is no pretence that the plaintiff did procure the offer or could procure it.

Had there been any fraud or bad faith in the matter on the part of the defendant, the principle of *Wilson v. Deacon* (1911), 2 O.W.N. 1229 (affirmed in Divisional Court, 3 O.W.N. 163), might be considered to apply; but there is no such complication here—there is “no trick to deprive . . . the plaintiff of” his “commission, and to take advantage of” his “services:” *per* Lord Esher, M.R., in *Noah v. Owen* (1886), 2 Times L.R. 364, at p. 365; *Wilson v. Deacon*, 2 O.W.N. 1229, at p. 1232.

Willes, J., in *Curtis v. Nixon* (1871), 24 L.T.N.S. 706, at p. 708, says: “These actions by house-agents spring up at every turn, and as they are generally based upon agreements which they have persuaded people who are not so well versed in the law as themselves to enter into, to their injury, they ought not to be encouraged.” Without adopting that learned Judge’s view and without casting any reflection upon an estimable class of the community, I think it would be adding another terror to the ownership of property if the defendant were to be compelled to pay a commission under the circumstances of this case.

I have not thought it necessary to consider whether the sale was due to the plaintiff at all—the purchaser knew of the property and had it in mind to buy it—he knew who the owner was—and it was rather the purchaser who introduced the plaintiff to the defendant than *vice versâ*. Nor have I thought it necessary to go through the myriad cases in which the owner placed his property for sale in the hands of a land agent—perhaps the latest in the higher Courts are *Stratton v. Vachon*, 44 S.C.R. 395, and *Burchell v. Gowrie and Blockhouse Collieries Limited*, [1910] A.C. 614.

I am of opinion that the appeal should be allowed with costs and the action dismissed with costs.

*Appeal dismissed; RIDDELL, J., dissenting.*

## [IN THE COURT OF APPEAL.]

## COUNTY OF HALDIMAND V. BELL TELEPHONE CO. OF CANADA.

*Municipal Corporations—Telephone Company—Erection of Poles and Wires on Bridge—Absence of Consent of Municipality—Notice—Direction of Officer—Trespass—Remedy—Forum—Injunction—43 Vict. ch. 67 (D.)—45 Vict. ch. 95 (D.)—Railway Act, sec. 248—Application to Bridge as Part of Highway.*

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*Held*, that the Bell Telephone Company of Canada, the defendant, had not the right, without the consent of the municipality in the case of local lines, and without a week's notice or the direction of the municipality or its officer in the case of long-distance or trunk lines, to erect its poles and wires upon a bridge built by the Corporation of the County of Haldimand, the plaintiff, crossing the Grand river in the village of Cayuga; the bridge being a part of the highway.

The statutory power conferred upon the defendant by its Act of incorporation, 43 Vict. ch. 67 (D.), was modified by an amendment, 45 Vict. ch. 95, and both were superseded, in so far as the question in this case was concerned, by the provisions of sec. 248 of the Railway Act, R.S.C. 1906, ch. 37, which applies to bridges, notwithstanding that they are not specially mentioned in it, although mentioned in the incorporating Act.

*Held*, also, that the defendant, ever since it began the erection of poles and wires upon the bridge, was a trespasser; and the plaintiff was entitled to come to the Court for relief; and was not required to apply to the Board of Railway Commissioners; and the defendant should be enjoined from continuing to trespass.

Judgment of LATCHFORD, J., reversed.

ACTION by the Corporation of the County of Haldimand for a declaration that the defendant had not the right to erect telephone poles upon a bridge built by the plaintiff over the Grand river in the village of Cayuga, and for a mandatory injunction commanding the defendant to remove its poles and wires from the bridge.

April 4 and 5, 1911. The action was tried before LATCHFORD, J., without a jury, at Cayuga.

T. G. Meredith, K.C., and T. A. Snider, K.C., for the plaintiff.

G. Lynch-Staunton, K.C., and J. A. Murphy, for the defendant.

May 10, 1911. LATCHFORD, J.:—The poles were placed upon the bridge piers early in 1907, without the consent of the plaintiff. Permission to use the bridge in a certain way had been given in 1887, and the defendant had strung a few wires across the river on the brackets it was then permitted to attach to the bridge. But there is not the slightest warrant to be found in the permission granted in 1887 for the acts done by the defendant twenty years later. Nor is any justification afforded by the negotiations had

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with the plaintiff in November and December, 1907, and the earlier months of 1908. The by-law sanctioning the use of the bridge by the defendant failed to pass the municipal council, and the negotiations resulted in no act binding upon the plaintiff.

The only fact seriously in issue is, whether the attachment of the poles to the piers injures or tends to injure the bridge. The experts called by the parties to the suit give, as might be expected, conflicting evidence, but all agree that no actual injury has thus far occurred. I find, however, that the poles erected by the defendant with cross-arms and wires tend to weaken the piers and cause damage to the bridge. The piers are old. They were built in 1871. The mortar was inferior, and by 1904 the stones had become so loosened that it was found necessary to surround each pier by an eighteen-inch concrete "jacket," extending from the foundations to within five feet of the top of each pier, and to cement the joints in the stones above that level. The defendant rested its poles on the concrete jacket south of each pier, and secured the poles by passing iron bands around them, and fastening such bands to rock bolts placed in holes drilled in the piers. Some, if not all, of the poles are thus attached to stones supporting the outer bed-plates on which the main trusses of the bridge rest. The poles and attachments placed by the defendant upon the bridge add considerably to the weight the piers have to carry, and, under the influence of the wind, especially when the wires are coated with ice, exert a powerful leverage upon the top courses of the piers and undoubtedly tend to weaken the bridge, though they have thus far, I find, caused no damage to it.

Apart from the issue of fact thus disposed of, the defence is, that, under the Dominion Act incorporating the defendant, 43 Vict. ch. 67, sec. 3, the defendant was empowered to erect and maintain its telephone lines along the sides of and across or under any public highways, streets, bridges, watercourses, or other such places. The location of the lines and the opening up of the streets were required by an amending Dominion Act, 45 Vict. ch. 95, to be under the direction of a certain municipal officer, and in such manner as the municipal council should direct; and the works of the defendant were declared to be for the general advantage of Canada.

In *City of Toronto v. Bell Telephone Co. of Canada* (1903), 6



O.L.R. 335, it was held by the Court of Appeal, reversing the judgment of Street, J. (1902), 3 O.L.R. 465, that the defendant, under the powers conferred by sec. 3 of 43 Vict. ch. 67, had the right to erect its telephone lines in the streets of the city of Toronto. On appeal to the Judicial Committee of the Privy Council, the judgment of the Court of Appeal was confirmed: *Toronto Corporation v. Bell Telephone Co. of Canada*, [1905] A.C. 52. The principal question considered by the Courts was, whether the legislation was within the proper competence of the Dominion Parliament under sec. 91 of the British North America Act. This was determined affirmatively, and an Ontario Act, 45 Vict. ch. 71, was held to be *ultra vires*. But slight effect appears to have been given to the proviso, as amended by 45 Vict. ch. 95 (D.), that in cities, towns, and incorporated villages the location of the line or lines and the opening up of the streets for the erection of poles or for carrying the wires underground shall be done under the direction and supervision of the engineer or such other officer as the council may appoint, and in such manner as the council may direct. Lord Macnaghten, in stating the judgment of the Committee, says, at p. 60: "Their Lordships . . . do not think the words . . . can have the effect of enabling the council to refuse the company access to streets through which it may propose to carry its line or lines. They may give the council a voice in determining the position of the poles in streets selected by the company, and possibly in determining whether the line in any particular street is to be carried overhead or underground."

Bridges, it will be observed, are mentioned in sec. 3 of the statute in the same category as highways and streets; and it is urged on behalf of the defendant that it has all the rights in regard to bridges that under the judgment in the *Toronto* case it has been held it has in regard to streets. The wholesome restrictions imposed upon the defendant by sec. 248 of the Railway Act, R.S.C. 1906, ch. 37, were rendered necessary by the decision in *Toronto Corporation v. Bell Telephone Co. of Canada*; and the defendant, notwithstanding the wide powers conferred by 43 Vict. ch. 67, could not now construct its lines upon, along, across, or under any "highway, square, or other public place," without the consent of the municipality, or, failing such consent, without the leave of the Board of Railway Commissioners. An existing line like that

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in question in this case falls under sub-sec. 6 of sec. 248, which gives the plaintiff the right to apply to the Board of Railway Commissioners to have the poles removed. But the plaintiff has no other remedy until it suffers actual damage; and this action must be dismissed with costs.

The plaintiff appealed to the Court of Appeal from the judgment of LATCHFORD, J.

November 27, 1911. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

*T. G. Meredith*, K.C., for the plaintiff, argued that, on the facts of the case as found by the learned trial Judge, the plaintiff was entitled to judgment, and that he erred in his view that it was bound to apply to the Board of Railway Commissioners. The jurisdiction of the Courts was not ousted, and the plaintiff was entitled to the relief asked, on the same principles as were acted upon in *McKenzie v. Grand Trunk R.W. Co.* and *Dickie v. Grand Trunk R.W. Co.* (1907), 14 O.L.R. 671.

*G. Lynch-Staunton*, K.C., for the defendant, argued that the plaintiff had no right to dictate to the defendant as to the manner in which it should reconstruct its line, which was the real question involved, the defendant having already, with the consent of the plaintiff, attached its wires to brackets on the other side of the bridge. Under the statute 43 Vict. ch. 67, sec. 3 (D.), the defendant was entitled to the same rights as it was held to have in *Toronto Corporation v. Bell Telephone Co. of Canada*, [1905] A.C. 52, and these rights are not taken away by sec. 248 (2) of the Railway Act, in which bridges are not mentioned. Some of the lines in question are for long-distance service; and, by sub-sec. 4 of sec. 248, are expressly excepted from the operation of sub-sec. 2. The trial Judge has found that no injury has been done to the bridge; the plaintiff has, therefore, mistaken its remedy, which was to apply to the Railway Board.

*Meredith*, in reply, argued that the brackets to which the wires were attached with the plaintiff's consent, were altogether different from the poles which were now in question. As to whether the omission of the word "bridge" from sub-sec. 2 of sec. 248 could have the effect contended for by the defendant, he referred to sec. 2, sub-sec. 11, of the Railway Act, which shewed

that "bridge" was included in the term "highway." The right of the plaintiff to bring an action, in such circumstances as were here shewn, was held to exist in *Corporation of Wellington v. Wilson* (1864-5), 14 C.P. 299, 16 C.P. 124, and relief should be granted as in the *McKenzie* and *Dickie* cases, without resort to the Railway Board.

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February 1, 1912. MACLAREN, J.A.:—This is an appeal by the Corporation of the County of Haldimand from the judgment of Latchford, J., dismissing its action for an order compelling the company to remove its poles from the piers of the bridge crossing the Grand river at the village of Cayuga.

In May, 1887, the county council gave permission to the company to fasten a small scantling fixture to the rafters of the bridge, projecting about three feet from the side, upon which to put its wires. The wires remained there until 1907, when the company removed them to the other side of the bridge, stringing them upon poles inserted in the stone piers of the bridge. There were some negotiations between the parties as to allowing the poles to remain, but no agreement was come to.

By its defence the company asserted that, under its charter, 43 Vict. ch. 67 (D.), amended by 45 Vict. ch. 95, it had a right to do what had been done.

The trial Judge held that, under sec. 248 of the Railway Act, R.S.C. 1906, ch. 37, the company could not do what had been done without the consent of the municipality, or, failing such consent, without the leave of the Board of Railway Commissioners. He found, however, that the plaintiff had suffered no actual damage; and, until it did so, he held, its only remedy was to apply to the Railway Commissioners to have the poles removed; and dismissed the action with costs.

On behalf of the company it was argued before us that, as it was given power, under sec. 3 of 43 Vict. ch. 67, to "construct, erect and maintain its line or lines of telephone along the sides of and across or under any public highways, streets, bridges, water-courses or other such public places, or across or under any navigable waters," and as bridges are not mentioned in sec. 248 of the Railway Act, the company had the same rights with respect

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to this bridge as it was held by the Privy Council to have with respect to the streets of Toronto in *Toronto Corporation v. Bell Telephone Co. of Canada*, [1905] A.C. 52.

Sub-section 2 of sec. 248 of the Railway Act provides that except as therein provided a telephone company shall not "construct, maintain or operate its lines of telephone upon, along, across or under any highway, square or other public place within the limits of any city, town or village, incorporated or otherwise, without the consent of the municipality." Sub-section 3 provides that, if the company cannot obtain such consent on terms acceptable to it, it may apply to the Board of Railway Commissioners.

The trial Judge was of opinion that the omission of the word "bridge" in sub-sec. 2 had not the effect the company claimed; and I think he was clearly right. The bridge in question is a part of the highway, and is covered by the language of the sub-section.

The provisions of these two sub-sections do not apply to long-distance or trunk lines. The location of these is, by sub-secs. 4 and 5, subject to the direction of the municipality, or of its officer, unless they, after a week's notice in writing, shall have omitted to prescribe such location and make such direction.

It is admitted that some of the lines in question are local, and some are long-distance or trunk lines. With regard to the former, the company had no right to proceed without the consent of the plaintiff or of the Board. With regard to the latter, it should have given the week's notice or have received the direction of the municipality or its officer. With respect to both classes of lines, it was a mere trespasser; and I can find nothing in the law requiring the plaintiff to apply to the Board, or ousting the jurisdiction of the Courts.

In my opinion, the appeal should be allowed, and the order asked for by the plaintiff should be granted, unless the parties can, within a reasonable time, either make a satisfactory agreement, or, failing this, the defendant take the steps prescribed by the Railway Act.

MEREDITH, J.A.:—If the acts of the defendant, which are complained of, were unauthorised in law, it is a continuing trespasser to land, and ought to be enjoined from all further continuance of such trespass, the result of which would be the removal of

its poles and lines from the bridge in question and a restoration of it to the condition in which it would be now but for such trespasses; and this was not at all disputed upon the argument here.

The only substantial questions involved in the case are, therefore, whether the defendant had a legal right to do the things which it has done; and, if not, whether the plaintiff is seeking a remedy in the proper forum.

That there was no leave or license from the plaintiff to do that which has been done is very plain. The leave which had been given was to do something of a very different character; and even that leave was given, and indeed asked for, only subject to the right of the plaintiff to withdraw it whenever it saw fit. Subsequent negotiations never reached the stage of a completed agreement, or of leave or license.

The right upon which the defendant relies is the statutory power conferred upon it in its Act of incorporation; but that right was modified by an amendment to that Act; and subsequently both were superseded, in so far as the question in this case is concerned, by the provisions of sec. 248 of the Railway Act, R.S.C. 1906, ch. 37, under which no such work as that in question can be done without the consent of the municipality unless the line is a long-distance or trunk line, and in regard to such lines the location of the line upon the highway is made subject to the direction and supervision of the municipality, or of such officer as it may appoint, unless this is not done for a week after notice requiring it.

Some of the lines in question are not long-distance or trunk lines; and, therefore, the defendant had no power to erect them, because no consent of the municipality to it was ever given; and so, too, in regard to the lines which are long-distance lines, because they were erected without giving the week's notice, and without the direction and supervision of the municipality or of an officer appointed by it.

It was, however, contended that this Act did not apply because bridges are not expressly mentioned in it; but the bridge in question is but part of the highway, and is a public place, and the Act expressly applies to "any highway, square or public place in any city, town or village, incorporated or otherwise:" and, in addition to that, the interpretation clauses of the Act provide that the word "highway" includes any public road, street, land or other public

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way or communication." The fact that the defendant's Act of incorporation includes the word "bridges" with highways and streets can hardly be considered seriously a reason for excluding all bridges from the effect of the Railway Act.

Another contention was, that the work complained of was nothing more than a renewal or reconstruction of lines before constructed, and so was within the provisions of sub-sec. 6 of sec. 248 of the Railway Act, under which the plaintiff would be required to seek relief from the Board of Railway Commissioners of Canada; that, however, is, in fact, plainly not so; it was a new construction of a different character, upon the other side of the bridge.

Therefore, the plaintiff is entitled to relief; and there is nothing in the way of its coming into the ordinary Courts of the land seeking it; or to prevent such Courts granting it: see *Kemp v. London and Brighton R.W. Co.* (1839), 1 Railw. Cas. 495, 504; *Simpson v. South Staffordshire Waterworks Co.* (1865), 34 L.J. Ch. 380; and *River Dun Navigation Co. v. North Midland R.W. Co.* (1838), 1 Railw. Cas. 135, 154.

The appeal should be allowed, and the defendant should be enjoined from continuing to trespass upon the bridge in question as it has been doing ever since it began the erection of the poles and wires now complained of; no damages are, I understand, sought, and probably no substantial damage will have been sustained if the poles and wires be removed and the bridge made as good as it would be if they had never been erected; but the injunction should be stayed for three months to enable the parties to come to some agreement under which the lines may be carried over the bridge; or, failing that, so that the defendant may apply to the Board for such relief as it may think it is entitled to. And I desire to add that, in all such cases as this, it should be born in mind that a municipality has no right to make use of its power, under the enactment in question, to exact money for ulterior purposes.

The defendant should pay the costs of the action and of this appeal.

MOSS, C.J.O., GARROW and MAGEE, JJ.A., concurred.

*Appeal allowed.*

## [IN THE COURT OF APPEAL.]

## TORONTO AND NIAGARA POWER CO. v. TOWN OF NORTH TORONTO.

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*Municipal Corporations—Electric Power Company—Erection of Poles and Wires in Highways—Permission of Municipal Council—Necessity for—Opening of Highways—Approval—Designation of Places for Poles—Incorporating Act, 2 Edw. VII. ch. 107, secs. 12, 13, 21 (D.)—Application of sec. 90 of Railway Act, 1888, and Amendment—Consistency.*

Section 90 of the Dominion Railway Act of 1888, 51 Vict. ch. 29, is, by sec. 21 of the Act incorporating the Toronto and Niagara Power Company, 2 Edw. VII. ch. 107 (D.), made applicable to that company and their undertakings, in so far as not inconsistent with the incorporating Act; and the sub-section added to sec. 90 by 62 & 63 Vict. ch. 37, requiring the consent of the municipal council having jurisdiction over a highway to the erection of poles and wires in such highway, and making the opening up of the highway for such purposes subject to the direction and approval of such person as the municipal council may appoint, and permitting the council to designate the places for the poles, is not inconsistent with secs. 12 and 13 nor with other provisions of the company's incorporating Act, and is to be read as part thereof; and the powers given by secs. 12 and 13 are to be exercised in conformity with the directions of sec. 90 as so amended (now sec. 247 of R.S.C. 1906, ch. 37), in so far as they relate to the construction and maintenance of lines for the conveyance of light, heat, power, and electricity upon or along highways, squares, or other public places.

Judgment of BOYD, C., 24 O.L.R. 537, reversed.

APPEAL by the defendants from the judgment of BOYD, C., 24 O.L.R. 537.

December 6, 1911. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

G. H. Watson, K.C., and T. A. Gibson, for the defendants. The Act of incorporation of the plaintiffs, being ch. 107 of 2 Edw. VII. (D.), does not empower the plaintiffs to enter upon any public highway, and thereupon construct, erect, and maintain their poles and transmission lines on or across such highway. The Act does not give power to the plaintiffs, without the leave or license of the defendants, to take possession of a street or highway for the purposes of their business. There is an absence of authority or right on the part of the plaintiffs to do the things mentioned, without the express consent of the municipal council, and the direction and approval of such person as it appoints, and under its direction. These conditions are not inconsistent with the plaintiffs' incorporating Act. We refer to the following Dominion statutes in support of these contentions: 51 Vict. ch. 29, sec. 123, repealed by sec. 6 of 63 &

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64 Vict. ch. 23, and a new section substituted therefor; 51 Vict. ch. 29, sec. 90, amended by 62 & 63 Vict. ch. 37, sec. 1; 2 Edw. VII. ch. 107, sec. 21.

*D. L. McCarthy, K.C.*, for the plaintiffs. The only point in issue between the parties at the present time is, whether the plaintiffs require the leave or license of the defendants before proceeding with their proposed work. On this point the plaintiffs contend that the wording of secs. 12 and 13 of their incorporating Act, 2 Edw. VII. ch. 107, give them the right to do the work contemplated, without the leave or license of the defendants: *Toronto Corporation v. Bell Telephone Co. of Canada*, [1905] A.C. 52. The amendment made to sec. 90 of the Railway Act of 1888 was repealed in 1903 with the rest of the Act.

*Watson*, in reply.

February 1, 1912. § Moss, C.J.O.:—Appeal by the defendants from a judgment of the Chancellor of Ontario after trial without a jury.

The plaintiffs, an incorporated company, with power to produce, sell, and distribute electric and other power and energy, and for those purposes to construct, maintain, and operate lines of wire, poles, tunnels, conduits, and other works, and to erect poles, construct trenches and conduits, and do all other things necessary for the transmission of power, heat, or light, as fully and effectually as the circumstances require, brought this action against the Municipal Corporation of North Toronto for an injunction to restrain that body from interfering with or preventing the plaintiffs in the erection of poles and lines of wire in and along Eglinton avenue, a highway within the corporation limits, or in the alternative—by amendment asked for at the trial—for a declaration that they were entitled to erect their poles and wires for the transmission of electricity upon and along the public streets of the municipality, without the leave or license of the defendants.

The learned Chancellor awarded the plaintiffs the latter relief, subject to certain conditions as to depositing plans and books of reference, and obtaining the approval of the engineer of the Dominion Board of Railway Commissioners thereto.

The plaintiffs were incorporated by Act of the Dominion



Parliament, 2 Edw. VII. ch. 107, which was assented to on the 15th May, 1902. Section 21 of the Act declares that sec. 90—together with certain other sections—of the Railway Act, shall apply to the plaintiffs and their undertakings, in so far as the said sections are not inconsistent with the special Act.

The Railway Act in force at that time was the Act 51 Vict. ch. 29, which was assented to on the 22nd May, 1888. But, between that date and the date of the Act incorporating the plaintiffs, a number of amendments to the earlier Act had been made, and, among others, sec. 90 was amended by adding thereto a new sub-section.

This enactment is contained in the first section of the Act 62 & 63 Vict. ch. 37, which was assented to on the 11th August, 1899. When, therefore, in 1902, sec. 90 of the Railway Act was incorporated into the plaintiffs' incorporating Act, the sub-section added by 62 & 63 Vict. ch. 37 formed part of the enactments which were made to apply to the plaintiffs and their undertakings, in so far as they were not inconsistent with the incorporating Act.

At the trial, the existence of this sub-section appears to have been overlooked, and the learned Chancellor's attention was not directed to it. We are, therefore, without the benefit of his view as to its bearing upon the rights asserted by the plaintiffs.

Its language appears to render it applicable in many respects to the case in hand. To begin with, it specifies and deals with the case of companies empowered by Parliament to construct and maintain lines for the conveyance of light, heat, power, or electricity, that is to say, some of the very objects for which the plaintiffs were incorporated. And, with regard to that subject, it enacts that "when any company has power by any Act of the Parliament of Canada to construct and maintain lines . . . for the conveyance of light, heat, power or electricity, such company may, with the consent of the municipal council or other authority having jurisdiction over any highway, square or other public place, enter thereon for the purpose of exercising the said power, and, as often as the company thinks proper, may break up and open any highway, square, or other public place, subject, however, to the following provisions." One of

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these provisions (f.) is as follows: "The opening up of any street, square, or other public place for the erection of poles, or for carrying wires under ground, shall be subject to the direction and approval of such person as the municipal council appoints, and shall be done in such manner as the said council directs; the council may also designate the places where such poles shall be erected; and such street, square, or other public place shall, without any unnecessary delay, be restored, as far as possible, to its former condition, by and at the expense of the company." These provisions were carried into the Railway Act, 1903, and are now to be found, in a somewhat modified form, in sec. 217 of the Railway Act, R.S.C. 1906, ch. 37.

If these enactments, in so far as they require that a company with the powers possessed by the plaintiffs must proceed with the consent of the municipal council, and subject to the direction and approval of such person as it appoints and under its direction, are not inconsistent with the plaintiffs' incorporating Act, they are applicable to the plaintiffs and their undertaking; and, if so, the plaintiffs are left without support for the present action.

The plaintiffs rest the right asserted in the action upon secs. 12 and 13 of the incorporating Act.

Is there anything in them reasonably inconsistent with sec. 90 of the Railway Act, as it stood when it was imported into the plaintiffs' Act?

In other words, can it be fairly said that, having regard to the objects for which the plaintiffs were incorporated, the character of the work necessary to be done in order to carry these objects into effect, and the public ownership and user of much of the property upon, along, and over which the plaintiffs' powers were to be exercised, there is any substantial contradiction between the provisions of secs. 12 and 13 of the incorporating Act and sec. 90 of the Railway Act?

Sections 12 and 13 confer powers that are requisite and necessary as of course, in order to enable the plaintiffs to prosecute the enterprise for which they were incorporated.

They are empowered by sec. 12 to acquire, construct, maintain, and operate works for production, and works for the conduct and supply, of electricity and other power, and by means

thereof produce and transmit and furnish it to, or receive it from, others, as well as to perform other acts. And sec. 13 says that they may erect poles, construct trenches or conduits, and do all other things necessary for the transmission of power, heat, or light, as fully and effectually as the circumstances of the case may require, provided the same are so constructed as not to incommode the public use of streets, highways, or public places, or to impede the access to any house or other building erected in the vicinity thereof, or to interrupt the navigation of any waters, but they shall be responsible for all damage which they cause in carrying out or maintaining any of these works.

These provisions do not expressly negative the property rights of municipalities or individuals; and the stipulation as to payment of damages found in each of these two sections does not necessarily exhaust the conditions to which the plaintiffs could reasonably be required to conform.

The enactments of the sub-section added to sec. 90 of the Railway Act are not in conflict with what is enacted in secs. 12 and 13 of the incorporating Act. They follow naturally as directions incident to the exercise of the powers given to the plaintiffs in order to the carrying out of their enterprise. Even before the date of the plaintiffs' Act, the trend of legislation had set in the direction of municipal control over the exercise of powers upon streets and highways by incorporated companies; and that circumstance may account for the importation of sec. 90 into the incorporating Act. In any case, the question is one of construction of the Act as a whole; and the provisions are to be read together, if they may be so read without leading to an unreasonable or absurd result.

Reading them together, the meaning to be gathered seems to be, that secs. 12 and 13 confer powers to be exercised in conformity with the directions of sec. 90 of the Railway Act, in so far as they relate to the construction and maintenance of lines for the conveyance of light, heat, power, and electricity upon or along highways, squares, or other public places.

That being the case, the plaintiffs' case fails, and the action should have been dismissed.

It follows that the appeal must be allowed and the action dismissed; but, under all the circumstances, there should be no costs to either party.

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GARROW, J.A.:—I agree.

MACLAREN, J.A.:—The plaintiffs, professing to act under the powers conferred upon them by the Dominion statute of 1902 incorporating them, being 2 Edw. VII. ch. 107, were proceeding with the erection of poles for the purpose of stringing electric transmission wires along Eglinton avenue, in the town of North Toronto. They were stopped by the municipal authorities and their workmen arrested. They assert that the town authorities have nothing to say in the matter and no right to interfere with them, and bring the present action for an injunction restraining the town corporation from interfering, and for a declaration that they have the right to erect their poles and string their wires on the streets of the town, without asking leave so to do.

The works authorised by the company's Act of incorporation are declared to be for the general advantage of Canada. By sec. 12, "The company may acquire, construct, maintain and operate works for the production, sale and distribution of electricity and power, for any purpose for which such electricity or power can be used, and may construct, maintain and operate lines of wire, poles, tunnels, conduits and other works in the manner and to the extent required for the corporate purposes of the company, and may conduct, store, sell and supply electricity and other power, and may with such lines of wire, poles, conduits, motors or other conductors or devices, conduct, convey, furnish or receive such electricity to or from any person, at any place, through, over, along or across any public highway, bridges, viaducts, railways, watercourses," etc.

"13. The company may erect poles, construct trenches or conduits and do all other things necessary for the transmission of power, heat or light as fully and effectually as the circumstances of the case may require, provided the same are so constructed as not to incommode the public use of streets, highways or public places or to impede the access to any house or other building erected in the vicinity thereof, or to interrupt the navigation of any waters, but the company shall be responsible for all damage which it causes in carrying out or maintaining any of its said works."

The case was tried by the Chancellor, who held that under

the sections of their charter above quoted and the authority of *Toronto Corporation v. Bell Telephone Co.*, [1905] A.C. 52, the company had the right to erect their poles and string their wires along Eglinton avenue, without asking the leave of the town; but held that, before doing so, they should deposit a plan and book of reference as required by the Railway Act; and, inasmuch as the evidence shewed danger to the other wires on the streets of the town, the company should obtain the approval of their plan by the engineer of the Dominion Railway Board. We were informed by counsel for the company that they had deposited their plan and would obtain the consent of the Railway Board engineer, although they did not admit that the Board had any jurisdiction in the matter.

In my opinion, the company misconceived their rights, and I consider that the question at issue is governed by sec. 247 of the Dominion Railway Act, R.S.C. 1906, ch. 37, which does not appear to have been cited to the learned Chancellor. This section provides that "when any company is empowered by special Act of the Parliament of Canada to construct, operate and maintain lines . . . for the conveyance of light, heat power or electricity, the company may, with the consent of the municipal council or other authority having jurisdiction over any highway, square, or other public place, enter thereon for the purpose of exercising the said powers . . . subject, however, to the following provisions: . . . (e) The opening up of any street, square, or other public place for the erection of poles, or for the carrying of wires under ground, shall be subject to the supervision of such person as the municipal council may appoint," etc. Sub-section 5 provides that, if the company cannot obtain such consent, it may apply to the Railway Board, to which it shall submit a plan of the highway, square, or other public place, shewing the proposed location of such lines, wires, and poles. By sub-sec. 6, the Board may grant the application in whole or in part, and may make such changes or impose such terms as it deems expedient.

Section 21 of the company's charter provides that sec. 90 and some other sections of the Railway Act of 1888 shall apply to the company and their undertakings, except in so far as the

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said sections are inconsistent with the provisions of the charter. This would include the amendment to sec. 90 passed in 1899, 62 & 63 Vict. ch. 37, which provided that when any company was given power to construct and maintain lines for the conveyance of light, heat, power or electricity, the company might, with the consent of the municipal authority having jurisdiction over any highway, square, or other public place, enter thereon for the purpose of exercising the said power.

This amendment was referred to and relied upon by the defendants' counsel before us, and he informed us that it had not been cited to the learned Chancellor. The plaintiffs' counsel's reply to this argument was, that this amendment to sec. 90 was repealed in 1903, with the rest of the Railway Act of 1888, and was no longer law.

If the defendants had to rely upon this section, it would be necessary to inquire what effect the repeal of 1903 had, and whether the provisions of the amendment of 1899 were inconsistent with the powers conferred on the plaintiffs by their charter, and particularly by secs. 12 and 13, specially relied upon by their counsel.

But, in my opinion, it is not necessary for us to look at or rely upon the amendment of 1899. The Interpretation Act, R.S.C. 1906, ch. 1, sec. 20 (b), provides that "whenever any Act or amendment is repealed, and other provisions are substituted by way of amendment, revision or consolidation . . . any reference in any unrepealed Act, or in any rule, order or regulation made thereunder to such repealed Act or enactment, shall, as regards any subsequent transaction, matter or thing, be held and construed to be a reference to the provisions of the substituted Act or enactment relating to the same subject-matter as such repealed Act or enactment."

This precisely meets the present case. When the Railway Act of 1888 was repealed on its revision and consolidation in 1903, the second part of sec. 90 of the Act of 1888 was amended, and became sec. 195 of the Railway Act, 1903; and on the general revision of the statutes in 1906, this sec. 195 became sec. 247 of the Railway Act, R.S.C. ch. 37, quoted above; so that the company's charter of 1902 must now be read as if this sec. 247

had originally been embodied in and had formed a part of the company's Act of incorporation.

A reference to sec. 247 shews that it applies to any company empowered by special Act of Parliament to construct, operate, and maintain lines for the conveyance of light, heat, power, or electricity, and is not limited, like the amendment of 1899, to companies incorporated after a day named.

The company had, therefore, in my opinion, no right to proceed to erect their poles on Eglinton avenue, as they claimed they had the right to do, without the consent of the Municipal Council of North Toronto, and are subject to the supervision of such person as the said council may appoint; and, if the council refuse such consent, the company should apply to the Railway Board, submitting a plan of the streets, squares, or other public places on which they wish to exercise their powers, and the proposed location of such lines, wires, and poles.

The appeal should be allowed, and the plaintiffs' action dismissed, but without costs.

MEREDITH, J.A.:—Under the plaintiffs' Act of incorporation, 2 Edw. VII. ch. 107—assented to on the 15th May, 1902—sec. 90 of the Railway Act—with other sections of that enactment—was made applicable to the plaintiffs and to their undertaking, in so far as it was not inconsistent with the provisions of the Act of incorporation; and that section of the Railway Act, as it was when the plaintiffs were incorporated—62 & 63 Vict. ch. 37, sec. 1, assented to on the 11th August, 1899—and as it still is, required, and requires, the consent of the municipal council, or other authority, having jurisdiction over the highway, before such work as that in question could or can be done lawfully, as well as that the opening up of the highway should be subject to the direction and approval of such person as the municipal council should appoint, and should be done in such manner as such council should direct; which council might also “designate” where the poles should be erected.

These things are not inconsistent with the provisions of the Act of incorporation; and were quite in accord with the trend of legislation at that time, in that respect; a trend which, to say the least of it, has not since weakened.

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The power of the plaintiffs in respect of the matters here in question, conferred by the Act of incorporation, apart from that part of the Railway Act engrafted upon it, are by no means as plainly expressed as they might be, but the Act certainly does not, in so many words, provide for the carrying of the plaintiffs' wires along the highway, as they please, against the will of the municipality; and, reading sec. 90, of the Railway Act, into the Act of incorporation, as if it had there been set out in full, one can have no reasonable doubt that the right and power of the municipality, set out in it, were intended to be applicable to the plaintiffs' undertaking; and, that being so, this appeal must be allowed, and the action dismissed, because the acts of the plaintiffs, complained of in this action, were done in disregard of such right and power; but, as, for some unaccountable reason, the provisions of sec. 90 of the Railway Act, as they were at the time of the passing of the Act of incorporation, and since have been, were not brought to the attention of the Court below, I would make no order as to costs either here or there.

MAGEE, J.A.:—The powers of conducting its lines and erecting poles along the streets of a municipality given in 1902 to the plaintiff company by their special Act of incorporation, 2 Edw. VII. ch. 107, in secs. 12 and 13, were practically the same as those conferred upon electric telegraph companies by the general Act relating to them, R.S.C. 1886, ch. 132, and upon various telephone companies.

In 1899, it had become frequent that railway companies would apply for and be granted in their special Acts of incorporation power to generate and dispose of electricity for light, heat, and power, and to construct telegraph and telephone lines for public messages. In the session of 1899 alone, such powers were given to various railway companies—see, among others, 62 & 63 Vict. chs. 50, 66, 70, 72, 77, 85, and 87. There were no sections of the general Railway Act specially applying to these powers, and in some of the special Acts the particular company was given the powers of the Electric Telegraph Companies Act—*e.g.*, in 62 & 63 Vict. chs. 50 and 70.

So, in 1899, sec. 90 of the general Railway Act of 1888 was amended by 62 & 63 Vict. ch. 37, sec. 1, by adding a sub-section, 2, which, however, was not to apply to companies incorporated



before that year. That new sub-sec. 2 declared: "When any company has power by any Act of the Parliament of Canada to construct and maintain lines of telegraph or telephone, or lines for the conveyance of light, heat and power or electricity, such company may with the consent of the municipal council or other authority having jurisdiction over any highway, square or other public place, enter thereon for the purpose of exercising the said power, and, as often as the company thinks proper, may break up and open any highway, square, or other public place, subject, however, to the following provisions." The provisions (a) to (k) which follow are all restrictions upon the company, and one of them (f) declares that "the opening up of any street . . . for the erection of poles . . . shall be subject to the direction and approval of such person as the municipal council appoints, and shall be done in such manner as the council directs; the council may also designate the places where such poles shall be erected."

That this amendment of sec. 90 was intended to embody the general policy to be adopted for the future with regard to all such railway companies, can, I think, hardly be doubted, expressly limited as it was to companies incorporated in that session or thereafter. And it could hardly be argued with success that those companies which in that session had inserted in their special Acts a reference to the Electric Telegraph Companies Act could thereby override the new amendment and dispense with the consent of the municipal council.

I have said that it was the policy for all such railway companies, for I think it was limited to them. Although it refers to "any company," it was only an amendment of a section in the Railway Act of 1888, and in that Act "company" means "railway company." This is the more obvious when we turn to the Railway Act of 1903, which consolidated the various statutes as to railways. There, in the corresponding section, 195, the words are, "the company," which again means "railway company." In the present Railway Act, R.S.C. 1906, ch. 37, sec. 247, the expression "any company" is again used, but the definition of "company" is the same; and in the following section, 248, special reference is made to other telephone companies and requiring municipal consent.

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Then this company was incorporated in 1902, for equally dangerous if equally useful purposes, and Parliament declared that sec. 90 of the Railway Act and sixty-two other sections of that Act should apply to it, so far as not inconsistent with the special Act. As sec. 90 was only one of sixty-three sections thus incorporated with the latter Act, there cannot be said to be any implication that Parliament considered that particular section to be inconsistent with it. Section 90 was the one of the sixty-three sections which specially related to the powers of a company as to the construction of its line—and the sub-section added in 1899 was specially applicable to such works as those of this company. As the company was not a railway company, it was necessary in the special Act to declare that, for its purposes, in those sixty-three sections of the Railway Act, the word “company” should be deemed to mean this company.

Considering the objects of the company, there was certainly no reason why they should, in relation to highways, be given greater powers than railway companies with similar subsidiary objects. There was every reason why they should not. They stand practically in the same position as regards legislation as the companies I have referred to, which were given the powers of the Electric Railway Act. Can it then be said to be inconsistent with their power to construct their lines along the highways, that they should comply with sec. 90 and obtain the consent of the municipality? Section 12 of their special Act gives power to enter upon and take private property; but it could hardly be considered that it would be inconsistent with that to require them to take the proper regular proceedings under the provisions of the Railway Act made applicable.

So, when they are given power to put up their lines and poles upon the highway, there seems no reason to consider that they should do so otherwise than as prescribed by the very section (90) which is made applicable to them, and which requires the municipality's consent and approval and directions; and I do not see any inconsistency in the two enactments, although one qualifies the other, especially as the special Act itself, in sec. 13, shews that the public use of the streets and the private access to property was not to be incommoded. The necessity for approval of the authority which is the statutory guardian of such

streets, and responsible for their repair, is quite consistent with the right to put the poles and wires along them.

It is noticeable that in this singular special Act, which places no restriction on the locality of the company's operations in Canada, and indicates locality only in its title, the objects of the company are nowhere stated, but only as its powers are in various sections declared. There is every reason to construe these sections, then, to be as much statements of the objects of the company, as specifications of the way in which those objects are to be carried out; and, therefore, still less "inconsistency" in holding the general policy of sec. 90 to be applicable.

I am, therefore, of opinion that the consent of the municipality was necessary under the amendment of 1899, which was not brought to the attention of the learned Chancellor. This necessity has not been dispensed with by subsequent legislation.

In 1903, the Railway Act was recast and consolidated in 3 Edw. VII. ch. 58, which came into force by Royal Proclamation. It repealed the Act of 1888 and the amending Act of 1899, but it does not seem to have changed the situation. In sec. 195, it re-enacted the provisions of the 1899 amendment to sec. 90, and this time without restricting it to companies incorporated in or after 1899, thus emphasising the general policy; but, in sec. 5, it declared that, unless otherwise expressly declared, "where the provisions of this Act and of any special Act . . . relate to the same subject-matter, the provisions of the special Act shall be taken to override the provisions of this Act, in so far as is necessary to give effect to such special Act;" and that if in any special Act passed theretofore the application of any provision of the Railway Act was excepted, extended, limited or qualified, the corresponding provision of this Act shall be taken to be excepted, extended, limited, or qualified in like manner. It may be questioned whether that section, 5, relates to any companies other than such as the Act has in view, that is, "railway" companies, and whether it would apply to companies for a different purpose, as to which Parliament had, for the sake of brevity, referred to the Railway Act. But, whether that be so or not, it is evident that the powers of this company were not curtailed thereby.

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The same may be said of the revised Act of 1906, R.S.C. 1906, ch. 37, secs. 247, 3, and 4.

In all these Railway Acts of 1888, 1899, 1903, and 1906, the word "company" refers, as I have said, to a railway company (sec. 248 expressly refers to a telephone company). It is only by virtue of this company's special Act, sec. 21, that the word "company" in the specified sections can be taken to mean this company.

Then what was the effect of the repeal in 1903 of the Acts of 1888 and 1899? The Interpretation Act then in force, R.S.C. 1886, ch. 1, sec. 7, in clause 51, enacted that, whenever any Act is repealed and other provisions are substituted by way of amendment, revision, or consolidation, any reference in any unrepealed Act to such repealed Act or enactment shall, as regards any subsequent transaction, matter, or thing, be held and construed to be a reference to the provisions of the substituted Act relating to the same subject-matter. The same provision is to be found in the present Interpretation Act, R.S.C. 1906, ch. 1, sec. 20 (b). Thus, this company's special Act is to be read with sec. 247 of the present Railway Act, R.S.C. 1906, ch. 37, which governs, and is not, in my opinion, inconsistent with it.

I would, therefore, agree in allowing the appeal.

*Appeal allowed.*

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HELLER V. GRAND TRUNK R.W. CO.

*Railway—Injury to Passenger—Special Contract for Carriage of Horse and Passenger—Exemption or Limitation of Liability of Company—Approval by Board of Railway Commissioners—Railway Act, R.S.C. 1906, ch. 37, secs. 2(31), 340—"Traffic"—"Impairing."*

By sec. 2(31) of the Railway Act, R.S.C. 1906, ch. 37, "traffic" means the traffic of passengers, goods, and rolling stock; and the provision of the special contract in question in this case (set out in the judgment of MULOCK, C.J.Ex.D., ante 117), entirely freeing the defendants from liability in respect of the death or injury of the passenger travelling in charge of a horse, both being carried under the one contract, was not a destruction of all liability under the contract, but a limitation to the goods carried; and this came within sec. 340 (2) of the Act.

Upon this ground, the judgment of MULOCK, C.J., was affirmed; RIDDELL, J., agreeing with the judgment as to the meaning of the word "impairing" in sec. 340 of the Act; and FALCONBRIDGE, C.J.K.B., not dissenting therefrom.

APPEAL by the plaintiff from the judgment of MULOCK, C.J. Ex.D., 25 O.L.R. 117, dismissing the action.

January 23. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

W. S. Brewster, K.C., for the plaintiff. On the findings of the jury, judgment should have been entered for the plaintiff for \$500 damages. The defendants had no power to enter into a contract exempting themselves from total liability, as was attempted to be done in this case, and the contract, if entered into by the plaintiff, was null and void. See the Railway Act, R.S.C. 1906, ch. 37, sec. 284 (c), and sub-sec. 7; *Sutherland v. Grand Trunk R.W. Co.* (1909), 18 O.L.R. 139; MacMurchy and Denison's Railway Law of Canada, 2nd ed., pp. 473, 474, 475, and 476. The Railway Board has no power or authority to approve of a contract exempting the defendants from total liability where negligence is clearly established, as in this case. The case of *Harris v. Perry & Co.*, [1903] 2 K.B. 219, shews that, if the plaintiff here was a mere licensee and the defendants were negligent, they are liable. According to the findings of the jury, the learned trial Judge should have held that the plaintiff had no opportunity of reading the contract and was not aware of its conditions.

I. F. Hellmuth, K.C., for the defendants. The plaintiff must be taken to have known all that was in the contract of carriage, and at any rate his signature was not obtained by fraud: *Goldstein v. Canadian Pacific R.W. Co.* (1911), 23 O.L.R. 536, at p. 539, with the authorities there cited. The defendants had power to contract themselves out of all liability, with the sanction of the Board of Railway Commissioners, under sec. 340, sub-secs. 2 and 3, of the Railway Act, and the Board had full power to give such permission: *Bicknell v. Grand Trunk R.W. Co.* (1899), 26 A.R. 431. The word "impairing" in sec. 340 covers the case of total exemption from liability.

*Brewster*, in reply.

February 6. RIDDELL, J.:—This is an appeal from the judgment of the Chief Justice of the Exchequer Division, whereby he dismissed the action. The facts are set out with sufficient elaboration in the report of the case below, 25 O.L.R. 117.

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I am wholly in accord with the judgment, and think it cannot be set aside. Even were the conclusions of the learned trial Judge erroneous in respect of the meaning of the word "impairing" in the statute—and I am of opinion that they are not—the clause in the contract is not, in my view, such as that it destroys the "liability in respect of the carriage of any traffic." "Traffic" means the traffic of passengers, goods, and rolling stock, without discrimination: Railway Act, sec. 2 (31). Both the plaintiff and his horse were traffic and were carried under the one contract—the provision that the company should not be liable for injury to him is not a destruction of all liability under the contract of carriage, but a limitation of liability to the goods carried. This, I think, comes within sec. 340 (2) of the Act.

As to the ground upon which the trial Judge proceeded, I think a remark by my Lord during the argument illuminates the whole question. Counsel admitted, in answer to the Chief Justice, that a destruction of the liability was an "impairing" of it (of course the converse is not universally true, the sentence is not convertible, an impairment is not necessarily a destruction.) But the "impairing" is a genus, including destruction as a species—the word "impairing" is a generic term including "destruction." And there is nothing which indicates that "impairing" is used in the statute in a more narrow sense.

I agree also in the reasoning of the learned trial Judge.

The appeal should be dismissed with costs.

FALCONBRIDGE, C.J.:—I find myself constrained to hold that the judgment ought to be affirmed on the short ground that there is some liability left under the original contract, and it is destroyed only as to the carriage of passengers. By sec. 2, sub-sec. (31), of the Railway Act, "traffic" means the traffic of passengers, goods, and rolling stock.

I do not wish to be understood as in other respects not agreeing with the reasoning of the Chief Justice of the Exchequer Division.

There is an interesting discussion of the meaning of the word "impair," as used in the constitution of the United States, in *Blair v. Williams* (1823), 4 Littell (Ky.) 35, at p. 69.

BRITTON, J.:—I agree in the result.

*Appeal dismissed with costs.*

## [DIVISIONAL COURT.]

## DESTRUVE V. MCGUIRE.

*Intoxicating Liquors—Excessive Drinking in Hotel—Death from Exposure to Cold—Liquor License Act, sec. 122—Proximate Cause of Death—“Caused by such Intoxication.”*

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The judgment of TEETZEL, J., ante 87, was affirmed.

APPEAL by the defendants from the judgment of TEETZEL, J., ante 87.

February 9. The appeal was heard by a Divisional Court composed of BOYD, C., LATCHFORD and MIDDLETON, JJ.

*James Haverson*, K.C., for the defendants, argued that the plaintiff's perishing from cold was not the result of any intoxication from drinking in the hotel. That intoxication ceased through the effects of the walk of five or six miles which the plaintiff took in the cold before a bottle of spirits was opened at the roadside. The fatality was due to the new state of intoxication induced by the subsequent indulgence. For this the defendants could not rightly be held liable under the provisions of sec. 122 of the Liquor License Act, R.S.O. 1897, ch. 245.

*G. H. Watson*, K.C., for the plaintiff, contended that the judgment appealed from was right. The plaintiff continued to be intoxicated from his excessive drinking in the hotel from the time he left it until his death. It was "while in a state of intoxication from such drinking" that he came to his death by perishing from cold, and, therefore, the defendants were liable under sec. 122 of the Act.

The judgment of the Court was delivered at the close of the argument by BOYD, C.:—We cannot disturb the findings of the trial Judge. The question was entirely a matter of fact. The Judge came to a reasonable conclusion; and I do not see that he is wrong. The judgment will be affirmed.

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## [DIVISIONAL COURT.]

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SWALE V. CANADIAN PACIFIC R.W. Co.

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Jan. 19.

Feb. 1.

Feb. 6.

Feb. 12.

*Parties—Third Party Notice—Con. Rule 209—Time for Service—Extension under Con. Rule 353—Indemnity or Relief over—Warehousemen—Auctioneers—Principal and Agent—Damages—Scope and Application of Third Party Rules and Procedure.*

Goods which the defendants had carried for the plaintiff, having been in their possession for a long time, were handed over by the defendants to auctioneers to be sold to pay the defendants' charges. The auctioneers sold a part of the goods, which realised less than the amount of the charges. Some of the goods were delivered by the auctioneers, both before and after the sale, to the plaintiff's agent. The plaintiff alleged improper accounting and conversion, and claimed from the defendants a proper account of the goods sold, the value of the goods converted, or damages for the conversion. The defendants pleaded and counter-claimed; and, long after issue joined, the defendants obtained leave to serve and served upon the auctioneers a third party notice claiming indemnity or relief over:—

*Held*, a proper case for a third party notice under Con. Rule 209.

*Held*, also, that, although the notice should have been served within the time limited for the delivery of the defence (Con. Rule 209), there was power in the Court to extend the time (Con. Rule 353); and it should be extended, the plaintiff not objecting.

Order of RIDDELL, J., affirmed.

*Per RIDDELL, J.* (after reviewing the Ontario cases):—Con. Rule 209 has been given too narrow an application; but, taking the tests laid down in *Gagne v. Rainy River Lumber Co.* (1910), 20 O.L.R. 433, there was in the present case the implied contract of the auctioneers with the defendants; and the damages, if any, recovered by the plaintiff from the defendants would be the measure of damages recoverable by the defendants from the auctioneers, their agents. It would be unfortunate if there were to be two trials by different tribunals of the same questions; and, as no possible harm could accrue to any one from allowing the third party notice to be served, the service should be allowed.

*Per BOYD, C.*:—The liberal provisions of Con. Rule 209 should be construed with a view to practical efficiency rather than to scientific accuracy.

*Per MIDDLETON, J.*:—The third party Rules are remedial, and should be freely applied to cases falling fairly within them. The right to invoke the third party procedure exists whenever the plaintiff's claim against the defendant, if successful, will result in the defendant having a claim against the third party to recover from him the damages which he has been compelled to pay to the plaintiff. The defendant must shew that he has a right to indemnity or relief over in respect of the plaintiff's recovery against him. The right of indemnity need not be for the whole of the plaintiff's claim—it may be for any separate or separable part of the plaintiff's claim. Nor need this measure the full extent of the defendant's claim; it is enough if he can claim, *inter alia*, indemnity in respect of the plaintiff's recovery. The rights of parties to actions should not be disposed of upon summary applications to set aside third party notices.

MOTION by Suckling & Co. to set aside an order obtained by the defendants allowing them to serve a third party notice on the applicants and to set aside the notice served pursuant to the order.

December 29, 1911. The motion was heard by Mr. James S. CARTWRIGHT, K.C., Master in Chambers.



*W. Laidlaw*, K.C., for the applicants.

*Angus MacMurchy*, K.C., for the defendants.

*W. M. Hall*, for the plaintiff.

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January 19. THE MASTER:—This action began on the 1st February, 1910. The statement of claim was delivered on the 21st March, 1910, and has never been amended. The statement of defence and counterclaim was delivered on the 8th April, 1910, and was amended on the 9th October, 1911.

The cause was for a long time at issue, and was even set down for trial. The trial has been delayed by a commission on the part of the defendants to take evidence in England, which has never been executed.

The plaintiff here is not objecting to the delay, but submits to any order that may be made.

The counsel for the third parties strongly presses his motion, and relies mainly on *Parent v. Cook* (1901), 2 O.L.R. 709, and case there cited. *Parent v. Cook* was affirmed by a Divisional Court (1902), 3 O.L.R. 350. It is true that Street, J., did not agree with Meredith, C.J., that Con. Rule 353 could not be applied in a proper case. But he agreed in the decision itself, and so his remark was *obiter* only. Britton, J., agreed entirely with the Chief Justice, as I understand the note of the oral judgment.

In these circumstances, I think the order should not have been made, and must now be set aside.

I set it aside with less hesitation because it is not by any means clear whether, even if the defendants had moved promptly, it is a proper case for an order under Con. Rule 209. The claim would have to be maintainable on the ground of indemnity. If based on the contract between the defendants and the third parties, who, as auctioneers, sold the goods for which the action is brought, then it would not be a case for the third party procedure. See *Birmingham and District Land Co. v. London and North Western R.W. Co.* (1887), 56 L.T.R. 702, in the Court of Appeal—a very full judgment.

Another reason is, that the third party should have fresh discovery, both from the plaintiff and the defendants, if so desired. This has been fully gone into already between the plaintiff and defendants, and to add a third party at this stage would be almost

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equivalent to a new action, the expense of which would, as between the plaintiff and defendants, as well as between the defendants and the third parties, have to be costs against the defendants in any event.

The third parties have been asked to join in the action, and have refused to do so, or to undertake the defence. It would, therefore, seem that they will be bound by the result. See *Parent v. Cook*, 2 O.L.R. at p. 712.

These two latter grounds are mentioned only as shewing that little, if any, benefit would result to the defendants if the order were sustained. But, in setting it aside, I do so on the authority of *Parent v. Cook*, *supra*, which is certainly binding on me.

The order must, therefore, be set aside, with costs to the plaintiff in any event and to the third parties forthwith after taxation, unless the defendants will accede to their being fixed by me at \$25.

The defendants appealed from the order of the Master.

January 30. The appeal was heard by RIDDELL, J., in Chambers.

*Shirley Denison*, K.C., for the defendants.

*W. Laidlaw*, K.C., for the third parties.

*W. M. Hall*, for the plaintiff.

February 1. RIDDELL, J.:—The plaintiff alleges that she, in 1908, delivered to the defendants, in Liverpool, England, 97 cases of settlers' effects for Toronto; that they arrived at Toronto in June, 1908, and she was duly notified of such arrival by the defendants; that, by delay occasioned by an interpleader, she was prevented from taking delivery till March, 1909, when an order was made putting an end to the interpleader proceedings; that thereafter the defendants retained the goods till the 21st October, when they proceeded to advertise 90 of them; and that a portion of these was sold, realising \$1,700. She further alleges that no proper account was kept of the sale, and in many instances the amounts accounted for are too small—also, that, while the goods were in the custody of the defendants, they were opened and unpacked and a large quantity converted by the defendants to their own use—and the statement concludes: "11. . . . By reason of the conversion by the defendant company of a large portion

of the said goods and effects, and its improper and wrongful accounting in regard to the sale of such portion of them as were sold as aforesaid, the plaintiff has suffered damages to a large amount, to wit, to the sum of about \$1,500;" and the plaintiff claims: "1. That she is entitled to a proper account of the goods sold by the defendant company. 2. That she is entitled to be paid the full value of the said goods converted by the defendant company, its servants, workmen, and agents. 3. Or for damages for the conversion of the said goods referred to in the said statement of claim. 4. The costs of this action."

Upon the material and statements and admissions before me, it appears that the goods reached Toronto in July, 1908; that notice was given to the plaintiff of their arrival, but that she neglected to remove them; that it was in October that the claim was made resulting in interpleader proceedings, and that the claim adverse to the plaintiff was disposed of in her favour by Mr. Justice Anglin in February, 1909. Then, in October, the defendants put the goods into the hands of Suckling & Co., auctioneers, to sell, to pay the charges they had against the goods. The auctioneers received all the goods the shipping bill called for, and they sold, on the 21st October, what they did sell for less than enough to pay the charges of the defendants. Some of the goods, however, the auctioneers delivered, both before and after the sale, to the husband of the plaintiff, her agent. The auctioneers so delivered some goods before the sale "at the solicitation of an intimate friend," and, it is said, upon an undertaking that the goods would be accounted for—and, after they had sold what they thought was sufficient to cover the defendants' claim, they delivered the remainder to the husband.

The action was brought on the 1st February, 1910; the statement of claim was delivered on the 21st March, 1910; and the statement of defence and counterclaim, on the 8th April, 1910. This pleading sets up the arrival and notice; neglect of the plaintiff to remove the goods; interpleader and termination thereof; further neglect by the plaintiff to remove; sale by the defendants on the 21st October, 1909, realising \$1,480.63—the charges against the goods being \$1,657.79; notification to the plaintiff of time and place of sale and attendance thereat by the plaintiff or her agent without objection, and purchase by the plaintiff

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or her agent of some of the goods; account furnished in detail, and balance still due of \$177.16. The defendants claimed a dismissal of the action and judgment for \$177.16 and interest, &c. No further pleading was filed except a formal joinder by the plaintiff on the 21st April, 1910.

The record was passed on the 8th February, 1911; on the 10th March, a notice of motion for a commission to examine witnesses in England was served by the defendants; and on the 13th March, Mr. Justice Britton, upon application of the defendants in the trial Court, made an order for a commission to England, and ordered the case to be put at the foot of the list, but to be expedited, the defendants to pay the costs of the plaintiff for the two days she attended. The order was not taken out, but in May the defendants moved for particulars. The case came on again for trial, when Mr. Justice Middleton, on the 16th September, 1911, directed it to stand off the list, but to be entered again when ready for trial. On the 12th September, the solicitor for the defendants made an affidavit that he had but a short time before learned that the plaintiff or her agent had removed some of the goods, and served notice of motion for leave to amend his pleadings, for better particulars of claim, and further examination of the plaintiff and her husband. This was opposed, but the Master in Chambers, on the 25th September, made an order for amending pleadings and examination of the plaintiff's husband, enlarging the motion in respect of the other matter.

On the 4th December, 1911, the defendants obtained an *ex parte* order to serve a third party notice on the auctioneers. Some correspondence took place between the solicitors for the defendants and for the auctioneers; and at length these moved to discharge the order last-mentioned. On the 19th January, 1912, the Master in Chambers set aside the third party order; and the defendants now appeal. The order for commission has been taken out and conduct thereof assumed by the plaintiff—and the commission has not been executed. The plaintiff has not objected and does not object to the third party proceeding.

In support of the order appealed from, it was urged that the contract of the defendants was that of insurers, and consequently entirely different from any contract, express or implied, between

the defendants and the auctioneers. Supposing that such a difference would prevent the proper service of a third party notice (which I do not at all think), it is plain, from all the material and from what took place before me, that the claim of the plaintiff is not against the defendants as common carriers, and consequently insurers, but as warehousemen. The plaintiff says in effect to the defendants: "You had my goods, you had the right to sell them, but it was your duty to keep the goods safe, to open the boxes, etc., with care, to advertise properly, to sell prudently, to keep and render an accurate account of your sales, and to pay to me the balance of the proceeds over and above your claim. You did not do that. Your servants took some of the goods; you unpacked the goods; you made no proper inventory so that a proper sale could be had; you did not keep and render a proper account of the sale." The defendants say: "We think we did all we were called upon to do"—and now they desire to say further: "But, if we are in default, it is because the persons whom we trusted to act for us, the auctioneers, have not done as they should; they owed us the same duty which we owed to you—it was they who opened the goods, they who sold, they who kept what account was kept; and, if we are liable to you, it was entirely their fault, and they are liable to us for precisely that sum."

It seems to me impossible to conceive of a case in which our Con. Rule 209 is more to the point—and I do not think the cases prevent its application.

In *Smith v. Matthews* (1907), 9 O.W.R. 62, I held that, where agents by buying had rendered the principal liable to the plaintiff, there was a contract on their part to indemnify the principal against what he had to pay, the agents not delivering the goods. See this case before the Master in Chambers in (1906), 7 O.W.R. 598. I can see no difference between an agent buying and one selling.

Nor are the other cases adverse to this view.

*Payne v. Coughell* (1895), 17 P.R. 39, was under the old Rule 1313, which did not contain the words "or any other relief."

In 1881, the Judicature Act Rule, O. XII., R. 19 (Marginal Rule 107), was substantially as it is now; this was the same in the revision of 1888, Rule 328; but Con. Rule 1313 (23rd June,

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1894) amended the Rule by leaving out "or any other remedy or relief;" and the present Rule, reinstating these words, came in force on the 1st September, 1897.

In *Payne v. Coughell*, the Rule was as in England; and it was held, following the English cases, that the claim of the defendants, if it be but a claim for damages arising from breach of contract, is not a "claim to indemnity." But, after the change in 1897 of the Rule, in *Confederation Life Association v. Labatt* (1898), 18 P.R. 266, it was held that a claim based upon the implied warranty of title on the sale of goods was a claim which could come under the words "any other relief over" in Rule 209. Both Meredith, J., and the Divisional Court point out that the Rule has been changed.

In *Wilson v. Boulter* (1898), 18 P.R. 107, the Chancellor pointed out that "the object of the enactments is to prevent the same questions common as between all three (plaintiff and defendant and third party) from being tried on different occasions and in different forums:" p. 109. And, where an action in tort had been brought against the defendants for damages occasioned by a defective piece of apparatus, he set aside a third party notice served upon the makers of the apparatus, who had given no warranty. The learned Judge points out that the damages for the plaintiff against the defendants and those of the defendants against the third parties would be awarded on quite different principles.

In *Windsor Fair Grounds and Driving Park Association v. Highland Park Club* (1900), 19 P.R. 130, the plaintiffs claimed for rent of a race-track—the defendants alleged that a ferry company had agreed with the plaintiffs to pay and contribute so much per day toward this rent, and that the defendants thereby were induced to enter into the agreement with the plaintiffs; and they served the ferry company with a third party notice. In the Divisional Court it was pointed out that this could not be "indemnity," as there was no contract, express or implied, between the defendants and the third parties—nor was it "contribution," which arises when two or more persons are subject to a common liability other than fraud or a wilful tort; and that no "other relief over" could exist, as the defendants had and could have no cause of action

against the third parties, having no contract with them. Leave to appeal was refused.

In the much-canvassed case of *Parent v. Cook* (1901-2), 2 O.L.R. 709, 3 O.L.R. 350, the plaintiff sued the defendants for trespass to land and cutting down and removing timber, and the defendants served a third party notice on those who had sold them the timber. This was set aside as being too late. Meredith, C.J. (2 O.L.R. at p. 712), considered it unnecessary to express an opinion whether the case came within the Rule, though the inclination of his mind was against it, "for, assuming that it is, in my opinion nothing would be gained by bringing in the appellants as third parties. . . . The measures of damages in the one case might be . . . very different from that in the other . . ." In the Divisional Court (3 O.L.R. 350), Street J., said that "there was no common question to be tried; and the damages here are not merely the same damages that might be proved in another action;" while Britton, J., expressed no opinion on the agreement.

In *Langley v. Law Society of Upper Canada* (1902), 3 O.L.R. 245, the plaintiff sued for the amount of a book-debt assigned to him, and added the assignor as a defendant. The assignor, claiming that he was merely the agent of a bank, was allowed to serve a third party notice on the bank, following *Confederation Life Association v. Labatt*, 18 P.R. 266. This is the converse of *Smith v. Matthews*, and in another manner the converse of this case.

In *Miller v. Sarnia Gas Co.* (1900), 2 O.L.R. 546, the plaintiff sued the gas company for damages for escape of gas from their pipes; and the company alleged that the escape was caused by the negligence of the town corporation in constructing a sewer. The Court, Street, J., said, p. 548: "The third party procedure is only applicable where the defendant is, if liable to the plaintiff, entitled to recover against the third party the very damages which the plaintiff seeks to recover against him. Here . . . the damages which may be recovered by the plaintiff against the defendants are not the measure of the damages, if any, which may be recovered by the defendants against the third parties for the alleged tort of the third parties."

*Gagne v. Rainy River Lumber Co.* (1910), 20 O.L.R. 433, is

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much such another case. The plaintiff sued for damages because his ferry business was interfered with by the defendants' logs—the defendants alleged that the third party had built a dam in such a way as to impede their drive. Mr. Justice Teetzel thought that the third party notice could not stand, on two grounds: (1) that Con. Rule 209 applies only to a right to relief given by law in consequence of a breach of contract, express or implied, between the defendant and the third party, or is a right given by statute; and (2) that the damages recoverable by the plaintiff was not the measure of damages the defendants could recover from the third party. See also *Wade v. Pakenham* (1903), 2 O.W.R. 1183.

I am convinced that the Con. Rule has been given quite too narrow an application, and hope that the matter may receive full consideration in an appellate Court. But, taking the tests laid down by my brother Teetzel—in the present case there is the implied contract of the auctioneers with the defendants; and the damages recovered by the plaintiff, if any, from the railway company are the measure of damages recoverable by the railway company from the auctioneers, their agents. See also *London and Western Trusts Co. v. Loscombe* (1906), 13 O.L.R. 34; *Budd v. Dixon* (1907), 9 O.W.R. 371.

Applying the test in *Wilson v. Boulter*, it would be unfortunate if the damages on the two contracts should be assessed by two tribunals. See *Benecke v. Frost* (1876), 1 Q.B.D. 419, 422; *Ex p. Smith, In re Collie* (1876), 2 Ch.D. 51.

I have not considered the English cases as binding (being upon a Rule differently worded), though I have read those cited and several others.

Then, as to time, the notice should have been served (Con. Rule 209) "within the time limited for the delivery of . . . defence." Power exists in the Court to extend this time (Con. Rule 353); and the time should be extended, if a proper case is made out for such extension.†

The reason advanced for such extension is, that it was only recently that the defendants were aware that the auctioneers had had dealings with the plaintiff behind their back. This is to me no reason whatever. The statement is, that the auctioneers, without the knowledge of the railway company, allowed the plain-



tiff to take away certain of the goods intrusted to them to sell. This conduct, if it resulted in loss to the railway company, *e.g.*, if it prevented the full amount of the charges being obtained, no doubt gives a cause of action to the railway company—no doubt the railway company could sue both the auctioneers and the plaintiff for taking these goods, and could have counterclaimed in this action. But the liability on the implied contract to sell with care, &c., &c., was thoroughly known to the defendants from the beginning of the action. This conduct of the agents, said to be recently discovered, in no way increases the liability of the railway company to the plaintiff, but rather the reverse, for the plaintiff cannot make any valid complaint against the railway company in respect of the goods she herself took from the custody of their agent. I think, then, that I must consider the case as though no such discovery had been alleged.

I agree, however, *sub modo*, with what is said by the learned Master in *Ontario Sugar Co. v. McKinnon* (1904), 3 O.W.R. 64: "The limitation imposed by Rule 209 was not intended for any other purpose than to prevent unreasonable delay to the prejudice of the plaintiff." The case must be rare where any one but the plaintiff can be injured by the delay; and most of the cases have been cases in which he moved to set aside the third party notice—sometimes, indeed, the third party joining.

In *Associated Home Co. v. Whichcord* (1878), 8 Ch.D. 457, 38 L.T.R. 602, and *Birmingham and District Land Co. v. London and North Western R.W. Co.*, 56 L.T. R. 702, it was the plaintiff who moved; and in *Molsons Bank v. Sawyer* (referred to in *Ontario Sugar Co. v. McKinnon*), Mr. Winchester, Master in Chambers, would not give effect to an objection by the third party; nor did Mr. Cartwright, Master in Chambers, in *Stuart v. Hamilton Jockey Club* (1910), 2 O.W.N. 254.

It is true that it was the third party who objected in *Parent v. Cook*, but the time was not enlarged in that case, because, as the learned Chief Justice said (2 O.L.R. at pp. 711, 712): "The case is not, in my opinion, one in which I should, in the exercise of my discretion, enlarge the time allowed by the Rule for serving the notice . . . It is probable that the only question which would be determined at the trial, as well between the respondents and the appellants, as between the former and the plaintiff, would

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be, whether or not the acts complained of were unlawful or were lawfully done under the authority which the respondents plead as their justification for doing them. The measure of damages in the one case might be . . . very different from that in the other." In the Divisional Court, as we have seen, one of the learned Judges thought that it was not a case for a third party notice at all. This is no authority for saying that, where the plaintiff does not object, and the case is clearly one for a claim over, the time is not to be extended for serving the notice in a proper case.

In the present case, as I have said, it seems to me that it would be unfortunate if there were to be two trials by different tribunals of the same questions; and, as no possible harm can accrue to any one from allowing the third party notice to be served, such service should be allowed.

The defendants might also, if so advised, have counterclaimed from the auctioneers along with the plaintiff damages for the unauthorised interference with the goods, the property of the defendants; but, as such an amendment is not asked, I do not make an order in that sense.

The defendants will pay the costs of the motion before the Master in any event, as they should have moved long before, and are now obtaining an indulgence; and there will be no costs of this appeal.

February 6. Leave to appeal to a Divisional Court was granted to the third parties by MEREDITH, C.J.C.P.

February 9. The appeal was heard by a Divisional Court composed of BOYD, C., LATCHFORD and MIDDLETON, JJ.

*W. Laidlaw, K.C.*, for the third parties. The issue is, whether the third party procedure under Con. Rule 209 is applicable in this case. The rules established by the cases are, that there must be a common question in issue between the plaintiff and the defendant and between the defendant and the third party, and that the measure of damages as between the plaintiff and the defendant must be the same measure of damages as between the defendant and the third party: *Wilson v. Boulter*, 18 P.R. 107; *Campbell v. Farley* (1898), 18 P.R. 97; *Windsor Fair Grounds and Driving Park Association v. Highland Park Club*, 19 P.R. 130; *Miller v.*

*Sarnia Gas Co.*, 2 O.L.R. 546; *London and Western Trusts Co. v. Loscombe*, 13 O.L.R. 34; *Budd v. Dixon*, 9 O.W.R. 371; *Parent v. Cook*, 2 O.L.R. 709, 3 O.L.R. 350. I submit that the claim of the defendants against Suckling & Co. is an independent claim, which might have been proceeded upon, and which might now be proceeded upon, against Suckling & Co.; and, therefore, the claim of the defendants against Suckling & Co. is neither a claim to indemnity or a claim to relief over, within the proper construction of the Rule: *Wynne v. Tempest*, [1897] 1 Ch. 110; *Birmingham and District Land Co. v. London and North Western R.W. Co.* (1886), 34 Ch.D. 261; *Moore v. Death* (1894), 16 P.R. 296.

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*Shirley Denison*, K.C., for the defendants. The bulk of the defendants' claim against Suckling & Co. is the same as that of the plaintiff against the defendants. As to the third party procedure, Suckling & Co., being auctioneers, were both agents and bailees; and, while every bailee may not be an agent, an auctioneer is always an agent, and there is, as in any similar relationship, an implied contract of indemnity within Rule 209. If Suckling & Co. so dealt with the goods as to make the defendants liable, the defendants should be indemnified by Suckling & Co.: *Mainwaring v. Brandon* (1818), 2 Moore (C.P.) 125. See also Annual Practice (1912), vol. 1, under the heading "Agency," at p. 268, where a number of cases are cited in which a principal has been sued by an agent for indemnity. This is the converse of my proposition that indemnity is owing by an agent to a principal, but I find no cases on this particular point. *Confederation Life Association v. Labatt*, 18 P.R. 266, may be cited in favour of third party procedure being proper here. On the other point, I submit that the claims for damages between the plaintiff and the defendants and the defendants and Suckling & Co. are identical: *Benecke v. Frost*, 1 Q.B.D. 419; *Swansea Shipping Co. v. Duncan* (1876), 1 Q.B.D. 644; *Pettigrew v. Grand Trunk R.W. Co.* (1910), 22 O.L.R. 23.

*W. M. Hall*, for the plaintiff.

*Laidlaw*, in reply.

February 12. *Boyd, C.*:—The more important part of this case (if not the whole of it) will turn upon what was done with the goods after they reached the hands of the Canadian Pacific

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Railway Company at the end of their carriage to this country. The goods remained in the hands of the company till turned over to be sold by the auctioneers, Suckling & Co., to whose custody and sale rooms the goods were transferred in bulk. The packages or cases were then opened, and the goods disposed of in a manner which is challenged by the plaintiff. As to this part of the controversy, which appears to be the substantial part, the Canadian Pacific Railway Company claim to be indemnified by or to have relief over against the proposed third parties, Suckling & Co. The wrongdoing of Suckling & Co., if any, would be charged upon the railway company by the plaintiff; and the company should clearly have the right of resort to the wrongdoer. This may well be accomplished in one and the same action in which the plaintiff's claim is being prosecuted against the company. The same evidence that establishes the claim against the company will establish it against the auctioneers, on this part of the case; no delay or inconvenience can arise in dealing with the whole case so presented with the addition of the third parties; and the plaintiff makes no objection to the application. The liberal provisions of Con. Rule 209 should be construed with a view to practical efficiency rather than to scientific accuracy; and I see no reason to disagree with the carefully considered judgment of my brother Riddell.

This to be affirmed with costs in the cause to the plaintiff and defendants the company as against the third parties.

LATCHFORD, J.:—I agree.

MIDDLETON, J.:—The right to invoke the third party procedure exists whenever the plaintiff's claim against the defendant, if successful, will result in the defendant having a claim against the third party to recover from him the damages which he has been compelled to pay to the plaintiff.

It is not enough for the defendant to shew that, if the plaintiff establishes his case, he, the defendant, will, on the facts so established, have some cause of action against the third party. He must do more than this—he must shew that he has a right “to indemnity or relief over” in respect of the plaintiff's recovery against him.

At one time we had a Rule (328 of the revision of 1888) em-

powering the addition of a person as party where it appeared that any question in the action ought to be determined so as to bind such party. This has now been repealed, and this principle cannot be applied; but the Rules as they remain are remedial, and should be freely applied to cases falling fairly within them.

There is no foundation for the suggestion sometimes made, that the right of indemnity must be for the whole of the plaintiff's claim—it is enough if that right exists for any separate or separable part of the plaintiff's claim. Nor need this measure the full extent of the defendant's claim against the third party—it is enough if he can claim, *inter alia*, indemnity in respect of the plaintiff's recovery.

I adhere to what I said in *Pettigrew v. Grand Trunk R.W. Co.*, 22 O.L.R. 23, as to the way in which applications to set aside third party notices should be dealt with. The real question should be left to the trial; and such applications should form no exception to the general rule that the rights of the parties should not be disposed of on summary applications.

I would dismiss the appeal with costs to be paid by the appellants to the plaintiff and the defendants in any event of the cause.

*Appeal dismissed.*

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[RIDDELL, J.]

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*Will—Construction—Legacy—Annuity—Predecease of Legatee—Failure of Gift—Annuity during Lifetime of Widow—Death of Annuitant before Widow—Right of Personal Representatives—Specific Legacy—Vested Gift—Substitutionary Gift to Children of Legatee—Predecease of Legatee—“Children” of Legatees—Rights of Grandchildren.*

The testator by his will gave all his estate to his executors in trust: first, to convert all his real and personal property into money; second, out of the proceeds to pay certain legacies, among others, to pay to two named sisters each \$100 *per annum* during the lifetime of his wife; third, after payment of the legacies and debts, to invest the remainder of the estate and pay the interest and proceeds to his wife during her life; fourth, after the death of his wife, to pay to the two sisters before-mentioned each \$500, and to divide the remainder equally among all his brothers and sisters, including the two named, share and share alike. Then followed this clause: “Should any of my brothers or sisters die before the final division of my estate leaving lawful issue . . . the share to which such deceased brother or sister would have been entitled if living shall be divided equally amongst the children of such deceased brother or sister so that such child or children shall take the portion to which his her or their parent would have been entitled if living:”—

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*Held*, that the annuity and the gift of \$500 to one sister lapsed, she having died before the testator: sec. 37 of the Wills Act, 1 Geo. V. ch. 57, applies only when the intended beneficiary is a "child or other issue of the testator."

2. That, the other named sister having survived the testator but having died before the wife, her personal representatives were entitled to the \$100 a year given to her from her death till the death of the wife.
3. That the legacy of \$500 to this sister vested at the death of the testator, and the \$500 was payable to her personal representatives, the wife having died.
4. That the children of the sister who died before the testator were not entitled to a share, under the clause above quoted. The gift to children of brothers and sisters is substitutionary, not substantive—the children are beneficiaries out of that which the parent would have received if living.

(*Christopherson v. Naylor* (1816), 1 Mer. 320, and *Thornhill v. Thornhill* (1819), 4 Madd. 377, are still of authority.

5. That "children" in the clause quoted did not include grandchildren, and the children of deceased children of deceased brothers and sisters did not take in competition with surviving children of deceased brothers and sisters.

Review of the authorities.

MOTION by Eleanor Bolland, Edna Bolland, and Isabella Bolland, infants, under Con. Rule 938, for an order determining certain question arising upon the will of John M. Denton, deceased.

February 10. The motion was heard by RIDDELL, J., in the Weekly Court at London.

*E. W. M. Flock*, for the applicants.

*M. D. Fraser*, K.C., for all other beneficiaries.

*J. P. Moore*, for the executor.

February 14. RIDDELL, J.:—John M. Denton died in March, 1896, leaving a will dated in June, 1889—the provisions of which are as follows:—

"I give devise and bequeath to my friends John W. Jones and William M. Moore of the City of London Esquires all my real estate and remainder of my personal property of whatever nature or kind and wheresoever situated upon the following trusts.

"1. To sell and dispose of my real estate or any part thereof and to convert my personal property into cash as soon after my decease as my said trustees or the survivor of them may think proper so to do and until such sale to lease all or any portion of my said real estate.

"2. Out of the proceeds of my personal property to pay to the Protestant Orphans Home of London Ontario the sum of three hundred dollars.

"3. Out of the remainder of the proceeds of my said personal property and of the proceeds derived from such sale and leasing of my real estate as aforesaid to pay to my said nephew Edward A. Denton the sum of three hundred dollars.

"4. To pay to my sister Naomi Dickenson the sum of one hundred dollars per annum during the lifetime of my dear wife.

"5. To pay to my sister Mary Bolland during the lifetime of my said wife the sum of one hundred dollars per annum.

"6. After payment of the legacies before mentioned and of my lawful debts I desire my said trustees or the survivor of them to invest the remainder of my said estate in good securities and to lease such portion of my property as shall not be sold and to pay the interest and proceeds derived therefrom to my dear wife by quarterly payments during her life.

"7. After the death of my said wife to sell and dispose of all my real estate and property then unconverted and to pay to my sister Naomi Dickenson and to Mary Bolland each the sum of five hundred dollars to divide the remainder equally amongst all my brothers and sisters including the said Naomi Dickenson and Mary Bolland share and share alike.

"8. Should any of my brothers or sisters die before the final division of my estate leaving lawful issue then and in such case I desire that the share to which such deceased brother or sister would have been entitled if living shall be divided equally amongst the children of such deceased brother or sister so that such child or children shall take the portion to which his her or their parent would have been entitled if living.

"9. I appoint the said John W. Jones and William M. Moore the executors of this my will."

The widow died on the 23rd November, 1910.

Naomi Dickenson died on the 17th July, 1892, leaving her surviving a number of children, eight of whom survived the testator, and seven are still living; others of her children died leaving children, and others leaving grandchildren.

Mary Bolland survived the testator, but died before the widow. Some of her children died before her leaving children, and some of these children died leaving children.

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Samuel Denton and William Denton, brothers of the deceased, died after the testator, but before his widow—Samuel leaving a number of children, some of whom have died leaving children, and William leaving one child, who also died before the widow.

Jethro Denton is still alive.

These are all the brothers and sisters of the testator, viz., (1) Naomi, (2) Mary, (3) Jethro, (4) Samuel, (5) William.

1. The first question is: "Has the annuity to Naomi Dickenson given by the 4th clause lapsed, she having predeceased the testator?"

Before the Wills Act, there can be no doubt that there was a lapse in such cases, and the Wills Act does not operate to prevent it in the present case. R.S.O. 1897, ch. 128, sec. 36\*, applies only when the intended beneficiary is a "child or other issue of the testator." This proposed gift, therefore, fails entirely. The fact that it is an annuity and not a fixed sum is immaterial: *Smith v. Pybus* (1804), 9 Ves. 566, at p. 575, per Sir William Grant, M.R.

2. The second question is as to the \$500 left to her specifically in clause 7; and this question must be answered in the same way and for the same reasons.

3. The third question is: "Mary Bolland having survived the testator, and so having become entitled to the annuity under clause 5, but dying before the wife, what becomes of the annuity between the deaths of Mary Bolland and the widow?"

As far back as 1687, Lord Jeffries, L.C. (whose ability and merits as a Judge in purely civil matters have not received the recognition they deserve), in *Gifford v. Goldsey* (1687), 2 Vern. 35, decided that if a man possessed of a term for years determinable on lives devises £20 *per annum* to J. S. to be paid out of this estate, if the *cestuy que vies* should so long live, and J. S. die in the lifetime of the *cestuy que vies*, the annuity is payable to his executors during the remainder of the term.

In 1710, the Lord Keeper (Sir Simon Harcourt, afterwards Lord Harcourt, L.C.), in *Rawlinson v. Duchess of Montague* (1710), 2 Vern. 667, held that in a bequest of £50 *per annum*

\*Now 1 Geo. V. ch. 57, sec. 37.



to his executors during the lifetime of the Duchess of Montague the wife of the testator, to be for the separate use of Mrs. R., when Mrs. R. died during the lifetime of the Duchess, the annuity should be paid to the executors of Mrs. R., during the Duchess's life.

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The same learned Lord Keeper decided that in a devise of a lease to A. for life, A. to pay an annuity of £10 to B., her son, during her life—if the son B. died before A. his mother, the annuity still continued during A.'s life and became payable to the executors of B.: *Lock v. Lock* (1710), 2 Vern. 666.

Lord Hardwicke, L.C., followed the first-mentioned case (see also 1 Rolle's Abr. 831, pl. 5) in *Savery v. Dyer* (1752), 1 Dick. 162, 1 Ambl. 139. There R. D., by will, gave to J. S., a kinsman, during the natural life of his executor, one annuity or yearly sum of £50 to be paid him by his executor. J. S. died; the plaintiff was his executor; and it was adjudged that the plaintiff was entitled to the annuity during the lifetime of the executor. In the report in Dickens the Lord Chancellor is made to say: "If a personal annuity is given to A., it shall go to him for life only." No such expression is found in Ambler's report.

The expression was quoted in argument in *In re Ord* (1878), 9 Ch.D. 667, at p. 671, thus: "As to the annuity, that was a gift to the son for his personal advantage, and it could not be made to extend to a period beyond his life: *Savery v. Dyer*;" but this argument was not acceded to by Vice-Chancellor Hall; and the Court of Appeal (1879), 12 Ch.D. 22, supported the Vice-Chancellor's decision. In that case there was a provision that A., if he should attain the age of twenty-one years, should be paid £40 annually from his majority to the death or marriage of the widow. He attained the age of twenty-one years, and died in the lifetime and widowhood of the widow. Hall, V.-C., 9 Ch.D. at p. 673, says: "I must give full effect to the language of the will, and I hold that the annual payment of £40 was to continue . . . and that it is now payable to his legal personal representative during the lifetime of the widow or her widowhood." James, L.J., says, 12 Ch.D. at p. 25: "It has never been doubted that the gift of an annuity for a term or *pur autre vie* is a gift to the annuitant and his personal representatives during the term or the life of the *cestui que vie*."

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Baggalay, L.J., was at one time disposed to think that it was intended only for the personal enjoyment of the son (A.). "But, on further consideration, I have come to the conclusion that there is no such limitation." Thesiger, L.J., concurred.

*Lewes v. Lewes* (1848), 16 Sim. 266, is another very strong case. The testator directed the executors to pay £300 per annum toward maintenance, clothing, and education of all and every the children of his eldest son, in equal shares, during the son's life. The son had three children, all of whom attained the full age of twenty-one years—then one died, and the others claimed that, as he had no further need for "maintenance, clothing, and education," they should have all the annuity. But the Vice-Chancellor (Shadwell) held that the personal representative of the deceased child was entitled to be paid one-third of the £300 during the lifetime of the father (the eldest son of the testator).

The same rule is laid down in *Attwood v. Alford* (1866), L.R. 2 Eq. 479. "A gift of the income to arise from a fund during the life of A. to B., for his maintenance, is an absolute gift to B., his executors and administrators, during the life of A., and is not confined to the joint lives of A. and B.:" *per* Lord Romilly, M.R.

The authorities are perfectly clear and are consistent in the one sense from the earliest times—and I am bound by them to hold that the personal representatives of Mary Bolland are entitled to the \$100 a year from her death till the death of the widow.

4. "Mary Bolland having survived the testator, but dying before the wife, what becomes of the \$500 legacy to her, contained in the 7th clause?"

That the rules of vesting applicable to bequests of personalty also apply to realty directed to be converted, is quite clear: Theobald, Can. ed., p. 580 *ad fin.* One of these rules is: When the only gift is found in the direction to pay (as in this instance) and the postponement is merely on account of the property, as, for example, if there be a prior gift for life, the gift in remainder vests at once: *In re Bennett's Trust* (1857), 3 K. & J. 280; *Strother v. Dutton* (1857), 1 DeG. & J. 675; *Parker v. Sowerby* (1853), 17 Jur. 752; *Adams v. Roberts* (1858), 25 Beav. 658; but the vesting is postponed if the payment be deferred for reasons

personal to the legatee: *Hanson v. Graham* (1801), 6 Ves. 239; *Locke v. Lambe* (1867), L.R. 4 Eq. 372.

*Smell v. Dee* (1708), 2 Salk. 415, is an anomalous case and has no bearing upon the present will.

I think that the legacy vested at the death of the testator, and the \$500 is payable to the personal representative of Mary Bolland.

5. "Are the children of Naomi Dickenson" (who died as we have seen before the testator) "entitled to share, under the provisions of clause 8, in the remainder of the fund formed under clause 7?"

It is to be observed that the gift to children is substitutionary and not substantive—the testator does not say "to my brothers and sisters then living and the children of those then dead," but the children are beneficiaries out of that which the parent would have received if living.

In *Ive v. King* (1852), 16 Beav. 46, Romilly, M.R., said (p. 53): "If a testator give a legacy to a class of persons, such as the children of A., and goes on to provide, that in case of the death of any one of the children of A. before the period of distribution, the issue of such child shall take their parent's share, such issue cannot take, unless the parent might have taken; and consequently, if a child of A. be dead at the date of the will or at the death of the testator, the issue of that child cannot take anything." And he quotes *Coulthurst v. Carter* (1852), 15 Beav. 421; *Peel v. Callow* (1838), 9 Sim. 372; *Waugh v. Waugh* (1833), 2 My. & K. 41; *Christopherson v. Naylor* (1816), 1 Mer. 320.

The same rule is laid down in *Congreve v. Palmer* (1852), 16 Beav. 435, by the same learned Judge.

In *In re Potter's Trust* (1869), L.R. 8 Eq. 52, there was a bequest to the testator's "nephews and nieces . . . in equal shares," and, in the case of the death of any of these leaving issue, such issue were to take the share the deceased parent would have taken if living. Malins, V.-C., regretting such cases as *Christopherson v. Naylor*, "by which the testator's intention has been totally frustrated, when a yielding to a common sense view would have carried it out," and following what he "must call the rational construction," holds that a child of a nephew

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or niece who was dead at the date of the will is as much entitled to take as the child of a nephew or niece who died after that time, but before the testator, and that in both cases the child will be substituted for its parent."

This case is explained in *In re Hotchkiss's Trusts* (1869), L.R. 8 Eq. 643, where James, V.-C., says: "In *In re Potter's Trust*, and the cases which it followed, words occurred which were sufficient to satisfy the Court that the gift was not a gift to a class, followed by a substitution of other persons for dying members of that class; but that it was a gift which, upon fair principles of construction, could be made out to consist of a gift to two classes; first, to one class of children or nephews; and then to the issue of another class of children or nephews." The learned Vice-Chancellor goes through the cases, and holds that *Christopherson v. Naylor* is still of authority.

But, while the cases upon which *Ive v. King* is based have been attacked, I cannot find that the case itself has been questioned or the principle which I have quoted disapproved, but the reverse.

Long before this, in a case of *Thornhill v. Thornhill* (1819), 4 Madd. 377, the will contained a direction that certain land should go to the wife for life, be sold as soon as might be after her decease, and the money arising therefrom equally divided among the nephews and nieces of the testator—"the children of such as should be then dead standing in the place of their father and mother deceased." Certain of the nephews and nieces died during the testator's lifetime leaving children, and the question was, did these children take? Sir John Leach, V.-C., held that the gift "must necessarily be confined to nephews and nieces living at the death of the testator, and that they were to take only if they survived the wife; and that if they died after the testator and before the wife, then their children were to stand in their place."

This case was approved and followed by North, J., in *In re Hannam*, [1897] 2 Ch. 39, the last case I have seen on the point. The learned Judge points out that in *Smith v. Smith* (1837), 8 Sim. 353, 357, the Vice-Chancellor (Sir Lancelot Shadwell) does say, "I think that the decision in *Thornhill v. Thornhill* is wrong," but that he gives no reasons whatever. North, J., finishes his

judgment (p. 47): "I do not find *Thornhill v. Thornhill* impeached by any decision, notwithstanding that in Mr. Jarman's valuable book it is said that it has not been favourably received: and Sir John Romilly always regarded that case as rightly decided."

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This line of decisions shews how dangerous it is to allow what one may consider to be common sense to be the final test in the determination of the meaning of a will, alluring as such a course may be and is. The difficulty is, that what one Judge considers "common sense"—far removed from its original meaning as that much abused term is—is not even common sense, let alone sense, to another. My common sense is like that of Malins, V.-C., and tells me that, if a legatee is dead at the date of the making of the will, he is dead at the date of the death of the testator; but it seems that this is not law. And my common sense tells me that when an annuity is left for the maintenance, clothing, and education of A. for the life of B., when A. dies and no longer can make use of money for maintenance, clothing, or education, the annuity should cease, though B. continue to live. But that is not law either. So my common sense tells me that in the present case Naomi, who was dead at the time of the death of the testator, died "before the final distribution of" the estate. But the law says that this is not so.

I am bound by authority to hold that Naomi's descendants do not share in the fund bequeathed by clause 7.

6. The remaining question is: "Do the children of those children of the deceased brothers and sisters take in competition with their uncles and aunts?"

It is perfectly clear law that the word "children" does not include grandchildren: *Radcliffe v. Buckley* (1804), 10 Ves. 195; *Moor v. Raisbeck* (1841), 12 Sim. 123; *Pride v. Fooks* (1858), 3 De G. & J. 252; *Higgins v. Dawson*, [1902] A.C. 1; *Re Williams* (1903), 5 O.L.R. 345; *In re Clark* (1904), 8 O.L.R. 599; *Paradis v. Campbell* (1883), 6 O.R. 632; *Rogers v. Carmichael* (1892), 21 O.R. 658; *Murray v. Macdonald* (1892), 22 O.R. 557; unless, indeed, the circumstances are such that, unless it does, it is meaningless: *Berry v. Berry* (1861), 3 Giff. 134; *Fenn v. Death* (1856), 23 Beav. 73; *Loring v. Thomas* (1861), 1 Dr. & Sm. 497;

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*Re Kirk* (1885), 52 L.T.R. 346; *In re Smith* (1887), 35 Ch.D. 558; *Morgan v. Thomas* (1882), 9 Q.B.D. 643, at p. 646, *per* Jessel, M.R.

There is nothing in law or in philology to prevent grandchildren, or even more remote descendants, being called "children"—the "children of Israel" are far removed in time and number of generation from their father Israel. But this is done in interpreting wills only where it is reasonably necessary to give sense or consistency to the will.

In the present instance there is no such necessity. If any brother or sister die before the final division of the estate, *i.e.*, before the death of the wife (see *Thornhill v. Thornhill, ut supra*), "leaving lawful issue," his or her "children" are to take. "Issue" is, of course, generic and covers all the lineal descendants *in infinitum*, including grandchildren—but the provision is not that the share shall go to such issue, but to the "children," so that such child or children (not "such issue") shall take the portion to which his, her, or their parent would have been entitled if living. And the use of the word "parent," instead of "ancestor," seems to make the interpretation I am giving still more likely—although, of course, "parent" is not uncommonly used of a more remote ancestor than father or mother.

We are able to give every word of the will its primary proper meaning by this interpretation, whereas that claimed for the grandchildren would require a wrench to be given to the meaning of both "children" and "parent."

The grandchildren do not take in competition with the children. The same interpretation, I may add, has been put upon the word "children" in our Statute of Distributions: *Crowther v. Cawthra* (1882), 1 O.R. 128; and in policies of insurance, etc., *Murray v. Macdonald*, 22 O.R. 557. There will be judgment accordingly.

Costs of all parties out of the estate; the executors' between solicitor and client.

[An appeal was heard by a Divisional Court on the 3rd April, 1912. Judgment was reserved.]

## [DIVISIONAL COURT.]

## STAVERT V. CAMPBELL.

*Appeal—Privy Council—Security—Stay of Execution—Practice—Privy Council Appeals Act, secs. 3, 4, 5—Con. Rule 832(d).*

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Upon the perfecting of the security required by sec. 3 of the Privy Council Appeals Act, 10 Edw. VII. ch. 24(O.), upon an appeal to the Privy Council, execution in the original cause is (unless otherwise ordered) stayed, by force of sec. 4—no rules having been made by the Judges of the Supreme Court of Judicature for Ontario, as contemplated by sec. 5. The exception in Con. Rule 832(d), in regard to judgments directing the payment of money, is not applicable, having regard to the change made by sec. 4.

History of the statutory provisions and Rules relating to appeals to the Privy Council.  
Order of CLUTE, J., reversed.

MOTION by the defendant to set aside a writ of fi. fa. issued by the plaintiff upon the judgment of the Court, in favour of the plaintiff, upon the ground that, security having been given by the defendant for an appeal to the Judicial Committee of the Privy Council, execution in the original cause was thereby stayed, and that the issue of the writ was irregular and contrary to the Privy Council Appeals Act, 10 Edw. VII. ch. 24, sec. 4.

January 23. The motion was heard by CLUTE, J., in Chambers.

*F. Arnoldi*, K.C., and *F. McCarthy*, for the defendant.

*F. R. MacKelcan*, for the plaintiff.

January 25. CLUTE, J.:—In this case security has been given for an appeal to the Privy Council, and it is contended that thereby execution in the original cause is stayed.

This application is made to set aside a writ of fi. fa. issued on behalf of the plaintiff, on the ground that the issue of the writ is irregular and contrary to the statute.

The statute here referred to is 10 Edw. VII. ch. 24, sec. 4. Section 3 declares that no appeal shall be taken to His Majesty in His Privy Council until the appellant has given security as therein provided. Section 4 declares that, upon the perfecting of such security, unless otherwise ordered, execution shall be stayed in the original cause. Section 5 provides that, subject to rules to be made by the Judges of the Supreme Court, the practice applicable to staying executions upon appeals to the Court of Appeal shall apply to an appeal to His Majesty in His Privy Council.

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Con. Rule 832 declares that, upon the perfecting of the security for an appeal to the Privy Council, execution shall be stayed in the original cause, except in the following cases— . . . (d) If the judgment appealed from directs the payment of money, execution shall not be stayed until the appellant has given security to the satisfaction of the Court of Appeal or a Judge thereof, that if the judgment be affirmed, the appellant will pay the amount, etc.

It was urged by Mr. Arnoldi that the statute, having been passed since the Rule came into force, overrides the Rule. The statute is simply a revision of R.S.O. 1897, ch. 48, with a slight modification. Section 3 of the revised statute corresponds to sec. 4 of 10 Edw. VII. ch. 24, except that the words "unless otherwise ordered" are not in the revised statute.

I do not think that this objection can be supported. It would mean that any Rule of practice would be abrogated without reference to it where a statute was repealed and re-enacted in almost the same terms. Such a view cannot, I think, be entertained. Besides, the Interpretation Act, 7 Edw. VII. ch. 2, sec. 7, clause 48 (a), expressly provides that all rules made under a repealed Act shall continue good and valid, in so far as they are not inconsistent with the substituted Act or enactment, until they are annulled and others made in their stead.

I do not think the giving of the required security for appeal to the Privy Council had the effect of staying execution in the Court below.

The motion is dismissed with costs.

The defendant moved for leave to appeal to a Divisional Court from the order of CLUTE, J.

February 2. The motion was heard by BRITTON, J., in Chambers.

The same counsel appeared.

February 6. BRITTON, J.:—An application by the defendant for leave to appeal from the order of Mr. Justice Clute dismissing an application to set aside a writ of fi. fa. issued against the goods and chattels of the defendant, after the defendant had given security and perfected the same, pursuant to ch. 24, secs. 3 and 4, of 10 Edw. VII. (1910).



The order allowing the sum of \$2,000 paid into Court as sufficient security on the appeal herein to His Majesty in His Privy Council was made in the Court of Appeal on the 15th November, 1911.

The defendant contended that the security so given operated, under the Act cited, as a stay of proceedings. The plaintiff contended otherwise.

On the 19th December, 1911, the plaintiff's solicitors, having issued a writ of *fi. fa.* against the defendant, notified the plaintiff's solicitors of the same, and stated that they were holding the writ in order that the defendant's solicitors might move to set it aside. The defendant's solicitors moved accordingly, and Mr. Justice Clute, who heard the defendant's motion, dismissed it.

I am asked to grant leave to appeal from that decision and order.

The case involves a large amount of money, and is otherwise important because of the question of law raised. The construction of secs. 3 and 4 of the Act cited is asked. Section 4, if it stood alone, is perfectly plain and unambiguous. The words are, "Upon the perfecting of such security" (that is, the security required by sec. 3, and which in this case has been given), "unless otherwise ordered, execution shall be stayed in the original cause."

Section 5 creates the difficulty, if difficulty there be: "Subject to rules to be made by the Judges of the Supreme Court, the practice applicable to staying execution upon appeals to the Court of Appeal shall apply in an appeal to His Majesty in His Privy Council."

"The practice applicable" is subject to rules. What rules? The rules are not in express terms referred to, so that they can override or be of equal force with the statute. The rules, however, may be applicable, because the practice "shall apply," and the practice apparently is under Con. Rule 832. "Unless otherwise ordered," as found in sec. 4, can hardly apply to what is ordered by a rule, but may apply to some order made in the cause in Court or by a Judge. It may be argued that mere "practice" in obtaining an order authorised by a rule, cannot control the express terms of a statute.

In this case, sec. 4 is not interfered with by anything "otherwise ordered," unless these words mean that rules are to govern

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where rules have been made. I am not attempting to give a considered opinion upon the construction of this statute, as would be necessary were the case before me as or in an appellate Court. I have a doubt; and so can not satisfy myself in withholding the leave asked.

Leave to appeal granted. Costs in the cause.

February 8. The appeal was heard by a Divisional Court composed of BOYD, C., LATCHFORD and MIDDLETON, JJ.

*F. Arnoldi*, K.C., for the defendant, argued that Con. Rule 832 (*d*), on which Clute, J., based his judgment, had been abrogated by virtue of 10 Edw. VII. ch. 24, secs. 3, 4, 5, the statute having been passed since the Rule came into force. This view of the matter is in accordance with the general trend of provincial legislation, which is to favour the stay of execution. Under sec. 5 of the Act, the practice on appeals to the Court of Appeal, as to which there is no doubt, is to apply to appeals to the Privy Council, subject only to rules "to be made" by the Judges. No such rules have been made since the statute was passed, and rules "to be made" cannot refer to rules already made. He referred to *McMaster v. Radford* (1894), 16 P.R. 20.

*F. R. MacKelcan*, for the plaintiff, argued that Con. Rule 832 (*d*) was still in force, and had not been abrogated by the statute of 10 Edw. VII. He referred to *McMaster v. Radford*, *supra*, and to Safford & Wheeler's P.C. Practice, ed. of 1901, pp. 134, 207. The expression "to be made" has not the effect contended for by the appellant.

*Arnoldi*, in reply, argued that the whole matter of security had been put on a new footing by the statute of 1910.

February 14. BOYD, C.:—The defendant has paid \$2,000 into Court, and the same has been allowed as good and sufficient security on his appeal to the Privy Council, and an order has been made allowing his appeal to that final Court (15th November, 1911).

The practice respecting appeals to the Privy Council is to be found in 10 Edw. VII. ch. 24; and former Acts are therein repealed as from the 7th March, 1910. Section 4 of that Act declares that, upon the perfecting of such security (the security in amount herein given), execution shall be stayed in the original cause,

unless otherwise ordered. Without special order, the plaintiff has undertaken to issue execution; and, upon that process being moved against, Mr. Justice Clute has affirmed its regularity, and an appeal is now (by leave of Mr. Justice Britton) taken from his order to the Divisional Court.

Mr. Justice Clute bases his judgment on the terms of Con. Rule 832, declaring that in appeals to the Privy Council execution shall not be stayed, if the judgment appealed from directs the payment of money, until security is given for such amount. If this Rule is in force, his judgment is right; otherwise, not so. It appears to me that this Rule is not in force, by virtue of the recent legislation, but to make this plain needs a good deal of intricate examination of what has been, and how it has been, superseded.

The development of the practice is to be regarded. In R.S.O. 1877, ch. 38, as to appeals to the Privy Council, it was prescribed, by sec. 51, that, upon the perfecting of security for \$2,000, in respect of costs and damages, the execution should be stayed. But the next section, 52, declared that the provisions of the 27th section of the Act, as to appeals to the Court of Appeal, was to apply to Privy Council appeals, whereby execution was not to be stayed when the judgment directed the payment of money, till further security for that was given. On the revision ten years later, R.S.O. 1887, ch. 41, a separate Act, embodied the legislation as to appeals to the Privy Council; and, by sec. 3, upon perfecting security to the extent of \$2,000, execution was to be stayed. By sec. 4, the practice applicable to staying execution upon appeals to the Court of Appeal shall apply to appeals to the Privy Council. To ascertain that practice resort had to be made to the Rules passed by the Judges, of which No. 804 contained provision for special security in case of judgments directing the payment of money: *McMaster v. Radford*, 16 P.R. 20, 23. The provisions of the statute as to appeals to the Court of Appeal were taken out of the statute and reappear as Rules of Court: see Holmsted and Langton, ed. of 1890, p. 670 (see 51 Vict. ch. 2, sec. 4).

So the provisions as to Privy Council appeals were referred to in the Rules of 1888, and it was provided that security should be for \$2,000, and that any application to the Court of Appeal to stay proceedings shall be made in like manner and be upon the like terms as to security as is provided in like cases upon appeals to

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the Court of Appeal: Con. Rule 855. It is the union of these two Rules, which appear combined as the present Rule 832, which regulated the practice up to the 7th March, 1910. The last case on this point, which shews the then practice, is *Sharpe v. White* (1910), 20 O.L.R. 575, which was argued in the Divisional Court on the 31st January, 1910.

The Rules of 1897 provide that in cases of appeal to the highest Court in Ontario security need not be given (apart from special application) for the amount directed to be paid by the judgment in order to secure a stay of execution: Rule 827; and Rule 832 varies that policy as to an appeal to the highest Court of the Empire.

That was the state of the law under R.S.O. 1897, ch. 48, sec. 2, 3, 4. Section 4 reads: "Subject to Rules to be made by the Judges . . . under the Judicature Act, the practice applicable to staying execution upon appeals to the Court of Appeal in force prior to 16th April, 1895, shall apply to an appeal to Her Majesty in Her Privy Council." (See 62 Vict (1) ch. 2, sec. 1.) This was an expansion of what is found in R.S.O. 1887, ch. 41, sec. 4, which is quoted as its original.

A note as to chronology: R.S.O. ch. 48 (1897), referring to Rules to be made by the Judges, was prepared in draft soon after, if not before, the 13th April, 1897, the date of passing the Act 60 Vict. ch. 3, giving effect to the Revised Statutes of 1897, which were to be completed at an early date (see preamble). This body of Revised Statutes was, by proclamation, declared to come into effect on the 31st December, 1897 (see R.S.O. 1897, p. xxi.) The Rules referred to in sec. 4 of ch. 48 were made by the Judges under 58 Vict. ch. 13, sec. 42, and were approved and to go into effect on the 1st September, 1897 (see Rule 1 and title page of Con. Rules 1897), and were completed on the 23rd July, 1897 (see *ib.*, p. x.)

Prior to the making of these Rules, the practice as to these appeals was under the Con. Rules of 1888, which were in force on the 16th April, 1895, but were superseded by the new body of Rules consolidated as of 1897. No such action as to the making of Rules has taken place under or in contemplation of the passing of the Act 10 Edw. VII. ch. 24.

As I have said, this statute of 1897 is repealed; and the section

now in force when this security was given, reads: "Subject to Rules to be made by the Judges of the Supreme Court, the practice applicable to staying executions upon appeals to the Court of Appeal shall apply to an appeal to His Majesty in His Privy Council." That is to say, by the express enactment now in force the practice applicable to staying executions in appeals to the Court of Appeal shall apply to appeals to the Privy Council—which is, that no security for the amount directed to be paid by the judgments is required—subject to rules (i.e. of a contrary effect) to be made by the Judges. None such have been made: the Act contemplates and provides for future rules "to be made," and one must find some declaration of practice in such rules contrary to and equally explicit with the statutory declaration that execution shall be stayed when security for the \$2,000 has been given. This is a new statute, which, in my opinion, cannot be varied in its meaning by omitting some of the words and reading "to be made" as if synonymous with "already made."

For this reason, I cannot agree with the order of my brother Clute, which should, I think, be set aside, with costs in any event to the defendants.

LATCHFORD, J.:—I agree in the result.

MIDDLETON, J.:—When the Court of Error and Appeal was established, the statute (12 Vict. ch. 63) contained provisions relating to appeals to Her Majesty in Her Privy Council; and sec. 46 provided for giving security for the costs of appeal, and that "upon the perfecting such security, execution shall be stayed in the original cause: provided always, that the provisions of the first, second, third, fourth and fifth provisoes in the fortieth clause of this Act contained, shall be in force and apply to the appeal hereby granted, and the completion of the security hereby required shall not have the effect of staying execution in the original cause, in the different cases excepted out of the said fortieth clause, unless the provisions in the said provisoes contained shall have been complied with."

Section 40 relates to the stay of execution on an appeal to the Court of Error and Appeal. The first of the provisoes is, that the perfecting of security for the future costs shall not operate as a stay of execution unless additional security is given for the amount

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ordered to be paid. The practice upon the appeal to the Privy Council remained upon this footing until after the Judicature Act.

In the revision of 1877, the statute had been changed in form, but not in substance. The general provision for a stay of execution upon giving security for costs was placed in a separate section, 51, and the proviso requiring security for the debt when money was ordered to be paid, was embodied in sec. 52.

In 1887, the language of the statute was changed. By R.S.O. ch. 41, sec. 3, the general provision that "upon the perfecting of such security" (*i.e.*, the security for the costs of the appeal) "execution in the original cause shall be stayed," was continued. Section 4 provided: "The practice applicable to staying execution upon appeals to the Court of Appeal shall apply to an appeal to Her Majesty in Her Privy Council." It was assumed in general practice that this made no change in the law, and that sec. 4 had the effect of retaining the old proviso as an exception to the general words of sec. 3. The proviso itself was removed from the statute, and became Con. Rule 804 of the revision of 1888.

In 1895, the experiment was tried of providing for one appeal and one appeal only, and giving the dissatisfied litigant the right to go either to a Divisional Court or the Court of Appeal, and as part of the scheme all security on an appeal to the Court of Appeal was abolished (58 Vict. ch. 12, sec. 77), unless specially ordered.

This system was found to be unsatisfactory; and in the revision of 1897 provision was made for security for costs on all appeals to the Court of Appeal; but, on this being given, execution for a money demand is stayed (Con. Rule 827).

By the statute relating to Privy Council appeals, R.S.O. 1897, ch. 48, sec. 3 remains unchanged, and sec. 4 assumes this form: "Subject to rules to be made by the Judges authorised to make rules with reference to the High Court and the Court of Appeal under the Judicature Act, the practice applicable to staying executions upon appeals to the Court of Appeal in force prior to 16th April, 1895, shall apply to an appeal to Her Majesty in Her Privy Council." This statute came into effect on the 31st December, 1897. The 16th April, 1895, was the date when 58 Vict. ch. 12 came into force.

The Con. Rules of 1897 were not Rules made by the Judges,

but were Rules framed by a special commission appointed under 58 Vict. ch. 13, sec. 42; and, by 59 Vict. ch. 18, sec. 15, these Rules are given statutory effect.

These Con. Rules came into effect on the 1st September, 1897, four months before the revised statutes. In them a separate provision was made with reference to Privy Council appeals, and the Court of Appeal practice before 1895 was continued in Con. Rule 832 as applicable to Privy Council appeals, so that there was no conflict between the statute and the Rules, and the words "practice applicable to staying execution" received a statutory interpretation by Con. Rule 832.

No rules were ever made by the Judges under the statute.

By the statute of 1910 (10 Edw. VII. ch. 24) a change is made. Section 3 is modified. Execution is, upon the perfecting of security, to be stayed, "unless otherwise ordered." Section 4 is also changed: it becomes (as sec. 5): "Subject to rules to be made by the Judges of the Supreme Court, the practice applicable to staying executions upon appeals to the Court of Appeal shall apply to an appeal to His Majesty in His Privy Council." The Judges having made no rules, this statute is a clear provision that the present practice relating to the stay of execution on an appeal to the Court of Appeal shall govern, and not the old practice prior to 1895, referred to in the revision of 1897, and embalmed in Con. Rule 832.

It may be that the Judges have no power to cut down or modify the general provision, that, subject to such order as in the particular case may be deemed just, execution is to be stayed, and that no such general provision as Con. Rule 832 (*d*) would be valid. We are not now called on to interpret the expression "practice applicable to staying executions," as found in the Act of 1910. It may be found that it falls short of making Con. Rule 827 apply to Privy Council appeals.

The appeal should be allowed, and the execution should be set aside with costs to the defendant in any event of the appeal.

*Appeal allowed.*

[By a statute of 1912, the old practice has been restored.]

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## SIVEN V. TEMISKAMING MINING CO.

*Mines and Minerals—Injury to Miner by Fall of Rock—Mining Act of Ontario, sec. 164, rule 17—Neglect to Provide “Suitable Pentice”—Covering of Shaft—Trap-door Left Open—Negligence—Statutory Liability of Owners of Mine—Master and Servant—Findings of Jury.*

The plaintiff, a miner, was injured by a rock falling down the shaft of a mine in which he was working for the defendants. The rock came through a man-hole situated above the mouth of the shaft, where men were engaged in “stopping,” i.e., making an overhead excavation in the roof of the 300-foot level, below which was the shaft or winze in which the plaintiff was working. There was a trap-door over the mouth of the shaft or winze in which the plaintiff was, and this was open at the time of the accident. Before proceeding with the stopping, K., the workman in charge, sent his helper (C.) to see that the trap-door was closed, and C. called back that “everything was all right,” upon which the stopping proceeded. K. said that it was C.’s duty, not only to see that the trap-door was closed, but to see that it remained closed while the stopping was going on. The trap-door, however, was left open; if it had not been the plaintiff could not have been injured as he was. In an action at common law and under the Mining Act of Ontario to recover damages for the plaintiff’s injuries, the jury found, in answer to questions: (1) that the plaintiff’s injuries were caused by the negligence of the defendants; (2) “in not providing proper pentice over the man-hole into the stope.” They also answered “yes” to question 3, “Did the defendants fail to provide a suitable pentice for the protection of workmen in the shaft in which the plaintiff was injured (as required by sub-sec. 17 of sec. 164 of the Mining Act of Ontario)?” They also negatived negligence or contributory negligence on the part of the plaintiff:—

*Held* (MEREDITH, J.A., dissenting), that the plaintiff had established a good cause of action against the defendants for a breach of rule 17 of sec. 164; that there was reasonable evidence to support the findings of the jury; and that the findings were sufficient to warrant a judgment in the plaintiff’s favour.

Judgment of FALCONBRIDGE, C.J.K.B., affirmed.

*Per* GARROW, J.A.:—The trap-door, if kept shut, would have been a “suitable pentice,” in the language of rule 17, but when open was no pentice at all; and for the failure to keep it shut the defendants, and not the plaintiff, should suffer; the defence of common employment having no application in the case of a breach of a statutory duty.

*Per* MEREDITH, J.A.:—A “suitable pentice” is merely a suitable covering to save those below from things falling from above. The covering of the shaft was a perfect safeguard when the trap-door was closed; the trap-door was necessary for the working of the mine. The negligence of C. in reporting to K. that the door was closed was the direct and immediate cause of the plaintiff’s injury; and the action should have been brought against C., or against the defendants under the Workmen’s Compensation for Injuries Act.

ACTION by a miner to recover damages for injuries sustained by him by reason of the falling of a large rock from the third level in the defendants’ mine down the shaft or winze upon the plaintiff’s left hand. It was alleged by the plaintiff that the injury was caused by a defective condition of the defendants’



works, and in particular by their not sufficiently protecting the head of the shaft or wince from loose and falling rock, as required by the Mining Act of Ontario, 1908, sec. 164, rules 17 and 31.\*

April 3 and 4, 1911. The action was tried before FALCON-BRIDGE, C.J.K.B., and a jury, at North Bay.

The questions left to the jury and their answers were as follows:—

1. Were the plaintiff's injuries caused by the negligence of the defendants? A. Yes.

2. If so, what was their negligence? A. In not providing proper pentice over the man-hole into the stope.

3. Did the defendants fail to provide a suitable pentice for the protection of workmen in the shaft in which the plaintiff was injured (as required by sub-sec. 17 of sec. 164 of the Mining Act of Ontario)? A. Yes.

4. Did the defendants fail to comply with sub-sec. 31 of sec. 164, by examining the working shaft, level, and stope, in order to ascertain that they were in a safe and efficient working condition? A. We are of opinion that the shift boss or other officer going through the mine in the ordinary discharge of his duties does not fulfill the requirements of this sub-section. There has been no evidence produced to shew that systematic examination of the work was carried out.

5. Was the plaintiff guilty of negligence which caused the accident or which so contributed to it that but for his negligence the accident would not have happened? A. No.

6. If you answer "Yes" to the last question, wherein did his negligence consist? (No answer.)

7. At what sum do you assess the damages in case the plaintiff should be entitled to recover? A. \$2,500.

\*Section 164 of the Act (8 Edw. VII. ch. 21): The following general rules shall so far as may be reasonably practicable be observed in every mine:

17. Where a shaft is being sunk below levels in which work is going on, a suitable pentice shall be provided for protection of the workmen in the shaft.

31. The Manager or Captain or other competent officer of every mine shall examine at least once every day all working shafts, levels, stopes, tunnels, drifts, cross-cuts, raises, signal apparatus, pulleys and timbering in order to ascertain that they are in a safe and efficient working condition, and he shall inspect and scale, or cause to be inspected and scaled, the walls and roofs of all stopes or other working places at least once every week.

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*A. G. Slaght* and *G. T. Ware*, for the plaintiff, moved for judgment in his favour on the findings of the jury.

*M. K. Cowan*, K.C., and *G. H. Sedgewick*, for the defendants, renewed a motion for a nonsuit made at an earlier stage.

April 21 and May 24, 1911. Written arguments were submitted by counsel.

May 25, 1911. FALCONBRIDGE, C.J.:—The plaintiff proved, and the jury found failure by the defendants to comply with rules 17 and 31 of sec. 164 of the Mining Act of Ontario.

I do not consider myself bound to accept the defendants' definition of a "pentice" as a covering erected within the shaft itself or at its mouth.

To the quotations in the defendants' argument I add:—

"Sleep shall neither night nor day  
Hang upon his pent-house lid."

(Macbeth, Act I., sc. iii.)

"Pent-house lid," *i.e.*, eye-lid—a projection or lean-to attached to the wall of the face.

Judgment for the plaintiff for \$2,500 and costs.

The defendants, by leave, appealed directly to the Court of Appeal from the judgment of FALCONBRIDGE, C.J.K.B.

November 17, 1911. The appeal was heard by Moss, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

*H. E. Rose*, K.C., and *G. H. Sedgewick*, for the defendants, argued that, if there was any negligence that caused the accident, other than that of the plaintiff himself, it was the negligence of Crabbe, who was the plaintiff's fellow-servant; and, as the action could not succeed under the Workmen's Compensation for Injuries Act, it must fail altogether. It was alleged on the part of the plaintiff that the defendants had been guilty of a breach of the duty imposed upon them by rule 17 of sec. 164 of the Mining Act of Ontario in failing to provide "a suitable pentice" for the protection of the workmen in the shaft. There is no evidence shewing that the defendants failed to comply with the provisions of rule 17, and the finding of the jury in answer to the questions submitted to them is, in effect, that the negligence causing the accident was the omission of the

defendants to provide a proper pentice over the man-hole into the stope, where there is no statutory requirement, nor obligation at common law, that such a pentice should be provided.

A. G. *Slaght*, for the plaintiff, argued that, from the condition of the works, the defendants were bound to take extraordinary precautions to ensure the safety of their employees, and the evidence shewed that it was quite possible for them to have taken such precautions. The defendants, as found by the jury, had failed to perform the statutory duties cast upon them by rules 17 and 31 of sec. 164 of the Mining Act of Ontario, and they had also failed to discharge the obligation cast upon them at common law to adopt a reasonably safe system for the protection of their workmen: *Myers v. Sault Ste. Marie Pulp and Paper Co.* (1902), 3 O.L.R. 600, affirmed, *sub nom. Sault Ste. Marie Pulp and Paper Co. v. Myers* (1902), 33 S.C.R. 23.

*Rose*, in reply, argued that, if no breach of statutory duty was shewn on the part of the defendants, the plaintiff's case fell to the ground.

February 15. GARROW, J.A.:—The statement of claim alleges that the plaintiff, while in the employment of the defendants as a miner, on the 13th January, 1910, was engaged in running a drill at the bottom of a shaft or winze from the third level in the defendants' mine, when a piece of rock from the third level came down the shaft or winze upon the plaintiff and severely injured him; that the injury was caused by a defective condition of the ways, works, etc., of the defendants' mine, whereby the same were left unprotected or insufficiently protected; that the defendants were further negligent by a failure to have the working parts of the mine examined by a competent officer, and in not ascertaining that they were in a safe and efficient working condition, and in not keeping loose and falling rock clear from the shaft or winze in which the plaintiff was employed, and in not sufficiently protecting the head of such shaft or winze, as required by sec. 164, rules 17 and 31, of the Mining Act of Ontario, 1908, and amendments thereto. And the plaintiff claimed to recover under the common law, the Mining Act, and the Workmen's Compensation for Injuries Act.

The statement of defence set up, as to the claim under the common law, was that the defendants had employed competent

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servants and supplied them with proper material and appliances for the proper and efficient maintenance and management of the defendants' premises, plant, and business, and that the negligence, if any, was that of a fellow-servant; that the defendants' system of carrying on their business was the best and safest which they had been able to discover or devise, and was not such as to be liable to cause or contribute to the plaintiff's injury; that the plaintiff voluntarily assumed the risk; that the defendants had not been negligent, and that the plaintiff was guilty of contributory negligence; as to the claim under the Workmen's Compensation for Injuries Act, that no notice of the claim had been given within the time specified in the Act, nor had the action been brought within the period in that behalf therein prescribed. And, generally, the defendants denied that they had been negligent or had neglected any duty owing to the plaintiff.

Several witnesses were examined on both sides, and from the testimony so adduced the essential facts appear to be as follows. The plaintiff was severely injured and disabled by a piece of rock falling down the shaft in which he was working, through no fault of his. This rock came through a man-hole situated above the mouth of the shaft, where men were engaged in what is called "stopping." The stope is an overhead excavation, which was being made in the roof of the 300-foot level, below which was the shaft or winze in which the plaintiff was working. The entry into the stope was made through this man-hole, which was reached by a ladder resting on the floor of the level, near the mouth of the lower shaft or winze, in which the plaintiff was working. There was, at the time, a trap-door or covering over the mouth of the shaft or winze in which the plaintiff was, but which, unfortunately, was open at the time of the accident. If it had been closed, the injury to the plaintiff would not have occurred. This trap-door could not be and was not intended to be kept closed all the time. It had to be opened from time to time to permit men to pass up and down with the drills which the plaintiff was using, and it was open at the time, so the plaintiff said, to let the drill bucket down.

Before proceeding with the stopping, Kelly, the workman in charge, sent his helper (Crabbe) to see that this trap-door was

closed, and Crabbe called back that "everything was all right," upon which the stoping proceeded.

Kelly was examined as a witness, but Crabbe was not. It was Crabbe's duty, so Kelly said, not only to see that this trap-door was closed, but to remain near and see that it remained closed while the stoping operation was going on. That he did not do so is made evident by the undisputed fact that it was open, or the plaintiff would not have been injured in the manner in which no one disputes he was.

The learned Chief Justice left the case to the jury, in a very full and careful charge, to which no substantial objection was taken, and the jury answered the questions submitted as follows:—

(The learned Judge then set out the questions and answers as above.)

It was conceded that the action could not be maintained under the Workmen's Compensation for Injuries Act, because it had not been commenced in time.

And the defendants contend that there was no evidence proper for the jury of negligence at common law, or of a breach of duty under the provisions of the Mining Act, sufficient to entitle the plaintiff to maintain the action.

In my opinion, the plaintiff established a good cause of action against the defendants for a breach of rule 17 of sec. 164 of the Mining Act of Ontario, 8 Edw. VII. ch. 21, which provides that "where a shaft is being sunk below levels in which work is going on, a suitable pentice shall be provided for protection of the workmen in the shaft." The shaft in which the plaintiff was, was being sunk below a level in which work was going on. The circumstances, therefore, called upon the defendants to supply a "suitable pentice." The duty itself is too clearly expressed to admit of argument against it. The only real question is, therefore: Did the evidence shew that it had been reasonably performed? The jury by their third answer find generally that it was not. This finding, however, the defendants contend, must be interpreted by the second answer, and, so interpreted, means the placing of the pentice over the man-hole, which they say is an unreasonable and in fact impossible position in which to place it. I do not accede to either view, that is, that such an interpretation is compulsory, or that it would have been impossible

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so to place a pentice at the man-hole as to have prevented rock from falling into the shaft where the plaintiff was, although it may be conceded that to do so would, to some extent, have lessened the convenience of the man-hole, and would, of course, have involved the expenditure of money. The statutory duty, however, takes no account of inconvenience, or even expense, but is quite absolute in its terms. And the defendants themselves, in effect, so regarded it; for, while they contest the propriety, and even the possibility, of a pentice at the man-hole, they claim that the trap-door over the shaft itself was a pentice, and that, having supplied it, they have complied with the statute. That question was, upon the evidence and the charge, one which the jury was required to pass upon. The question itself (No. 3) was, as the learned Chief Justice told the jury, expressly based upon rule 17. After reading the rule he said: "The question follows that exact language, and the plaintiff asks you to say that the defendants did fail to provide a suitable pentice." He then described the meaning of the term "pentice," and wound up his remarks upon this head as follows: "Well, the defendants go further and say the trap-door was a pentice; and, if the trap-door had been closed, as it ought to have been, that was sufficient protection for the men below. There is the argument on one side and the other, and it is for you to determine upon your view of the case, and of the evidence, whether they did provide a suitable pentice for the protection of the men under the provisions of the Act."

Our duty, as I understand it, is to sustain the judgment if there was reasonable evidence to support the findings, if the findings themselves are reasonably sufficient to determine the issues between the parties. It sometimes happens that a finding is imperfect, or that two or more findings are inconsistent or even contradictory of each other. In such cases the remedy is usually a new trial—a thing to be avoided unless it is clearly required in the interests of justice. In this case, having regard to the whole evidence, the charge, and the findings, I am quite unable to see any imperfection or inconsistency which requires our interference.

Nothing that I see requires the third answer to be confined as the defendants contend. On the contrary, it seems to cover,

or at least to be sufficient to cover, other and wider ground than was intended by the second answer, and is, in my opinion, upon the evidence, the more complete and satisfactory answer of the two. The trap-door, if kept shut, would, as the learned Chief Justice seemed to think, have been a "suitable pentice," in the language of the Act, but when open was no pentice at all. And for the failure to keep it shut the defendants, and not the plaintiff, should suffer; the defence of common employment, it need scarcely be said, having no application in the case of a breach of a statutory duty: see *Groves v. Lord Wimborne*, [1898] 2 Q.B. 402; *Sault Ste. Marie Pulp and Paper Co. v. Myers*, 33 S.C.R. 23.

This conclusion makes it unnecessary to consider the effect of the answer to the fourth question.

I would dismiss the appeal with costs.

MOSS, C.J.O., and MACLAREN, J.A., concurred.

MAGEE, J.A.:—It is manifest from the reading of sec. 164 of the Mining Act that the danger to be guarded against by a suitable pentice over a shaft is not that from the fall of tools or material falling from within the shaft itself, but from the carrying on of work in levels above the shaft. Therefore, while perforce it must be adapted to the confined space, it should, above all, be sufficient for protection against that danger. I see nothing to say of what particular shape or how close to the shaft it must be, but it must be sufficient; and, if it is not, the Act has not been complied with. A covering from outside danger, which yet would allow free access to the shaft for workmen and for hoisting from and into it, might readily be provided. But the very object of the Act is, that there shall be something beside the carefulness of workmen which shall protect those who cannot protect themselves in the space below; and, if it is to be effective and suitable, it should be in operation without dependence on carefulness, and should only be out of operation when interfered with improperly.

Here the evidence is, that in the ordinary course of operation the trap-door was frequently and necessarily open, and, while open, no covering over it or protection was provided against the danger from the operations in the stope overhead near-by. That was left to the carefulness of the workmen only, and the

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improbability of that happening which did happen. The only wonder to me is, that it did not happen before. And, so far as I can see, a few short sloping boards inside the stope, in front of the so-called man-hole, would have prevented the danger, and yet afforded access to the stope behind them. That was the "work going on" in the level below which the shaft was sunk, and was the very thing from which there was most danger to be apprehended; and, unless danger from that source to the men in the shaft was guarded against, the pentice from other dangers was ineffectual; and, if it had been guarded against, there was practically little danger, so far as shewn, from other sources. That, I think, was what the jury had in mind by their second finding—not a pentice for the man-hole, but a pentice for the shaft, against that danger from the man-hole. In that finding they were well warranted by the evidence; and it is no answer to say, that the foreman or some one else sent some one to see at the last moment that the insufficient because open pentice was made sufficient for the time being by closing it.

I would dismiss the appeal.

MEREDITH, J.A.:—There is nothing extraordinary in the words "a suitable pentice." A suitable pentice is merely a suitable covering to save those below from things falling from above; protection from many more things than that which in falling from the west stope extraordinarily found its way from the stope through the small "man-hole" between the stope and the shaft, and then through the small opening in the covering of the shaft, called the trap-door, which happened to be open at the very moment when the work, which loosened the rock which caused the plaintiff's injury, was begun; open through the direct neglect of the plaintiff's fellow-workmen or workman, in regard to the closing of the trap-door. The workman who did the work which loosened the stone was Kelly, and he, before beginning that work, directed the other fellow-workman, Crabbe, to see that the trap-door was closed; Crabbe negligently reported to Kelly that the door was closed, and this negligence was the direct and immediate cause of the plaintiff's injury.

The course of the stone was, as I have said, extraordinary: it first bounded through a small man-hole space in a protecting



structure provided at the place where the mining was going on; and then, coming down to the pentice over the shaft, dodged again, as it were, through the small man-hole opening in that large structure, the door of the man-hole happening, at the moment, to have been very negligently left open. It is surely extraordinary that at both places it should find and pass through the very small opening rather than fall against very large protecting surfaces.

The covering of the shaft which I have mentioned was a perfect safeguard of the shaft below it, when the trap-door was closed. A trap-door was obviously necessary for the working of the mine; it was the only means of access for men and material to the shaft below it; and, of course, miners below are in danger from anything that may fall down upon them, whether bucket, man, tools, or materials, as much as rock being loosened.

It is said that the covering was not a pentice, because it had a trap-door in it; but how can that be, if, as is the fact here, a trap-door was necessary for the working of the mine?

If one have the mistaken notion that the trap-door was the pentice, it is very easy to go wrong. The trap-door was but a necessary opening in the large roof-like structure which was the pentice of the shaft in question. What the law required was a covering of the shaft for the protection of the men working in it against anything falling down upon them. What the defendants did was to roof the shaft over completely so as to form a complete protection of that character: but it was absolutely necessary that there should be a means of ingress and egress to and from the shaft, if men were to work in it and so need protection—if it were not to be abandoned: so what else was possible and practicable other than the man-hole; and what possible better “reasonably practicable” method of protecting it, and of at the same permitting reasonable use of the shaft, than a trap-door—the usual, if not the invariable, arrangement? To treat the trap-door as the pentice is to quite fail to grasp the situation—it covered but an absolutely necessary small opening in the large and complete pentice. Therefore, not only did the defendants provide “a suitable pentice,” “so far as was reasonably practicable,” but they provided one upon which no one’s ingenuity has yet been able to suggest a

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practicable improvement. To say that a pentice is not a pentice because it has a necessary door in it is equal to saying that a house is not safe if it have any door in it, because some one may negligently leave the door open.

I would allow the appeal and dismiss the action, which should have been brought against the men or man whose negligence caused the injury, or the defendants under the Workmen's Compensation for Injuries Act.

*Appeal dismissed; MEREDITH, J.A., dissenting*

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[IN THE COURT OF APPEAL.]

KLINE BROTHERS & Co. v. DOMINION FIRE INSURANCE Co.

*Fire Insurance—Removal of Goods Insured—Assent of Insurers—Burden of Proof—"Binder"—Application Form—Acceptance by Initials of Clerk of Former Agents—Authority—Indorsement of Consent after Fire—Ratification.*

Goods of the plaintiffs insured by the defendants against fire were removed from the building in which they were, to another building. The plaintiffs sought to obtain the consent of the defendants to the change of locality, and made application to a firm of insurance agents who had been but had ceased to be the agents of the defendants, upon a form called a "binder," which is, in effect, an application for insurance, and, when accepted becomes an interim receipt, constituting a binding contract of insurance, subject to the conditions of the policy to be issued upon it. The "binder" was presented to a clerk in the office of the defendants' former agents, and he, without inquiry and without consulting any one, initialled the application, and gave it to the plaintiffs' agent, placing a duplicate "on the file" in his masters' office. This was on the 14th January, 1909. The defendants had no notice or knowledge of the removal of the goods until some time in the following March, when the policy was sent to them by the plaintiffs for indorsement. On the 19th March, the goods were destroyed by fire; and, shortly after that, the defendants' secretary, having no notice or knowledge of the fire, indorsed upon the policy a formal consent (dating it as of the 14th January) to the continuance of the insurance upon the goods in the building to which they had been removed:—

*Held*, affirming the judgment of SUTHERLAND, J., that the defendants were not liable for the plaintiffs' loss.

*Per GARROW, J.A.*:—The "binder" should be regarded as if, when it was given, the agents by whose clerk it was initialled were still the agents of the defendants and had themselves given it. But the plaintiff were bound, within a reasonable time, to produce the policy to the defendants for the purpose of having the further formal indorsement made. In doing this there was inexcusable delay; and, through no fault of the defendants, the indorsement was not made in time. The consent indorsed after the fire did not bind the defendants, it having been given in ignorance that a fire had occurred. The fire had completely altered the relation of the parties, and had fixed their respective rights and obligations under the contract as it then stood. That the consent was antedated was of no consequence; the defendants could not be assumed to have intended to ratify the binder, of which they then knew nothing.

*Per MEREDITH, J.A.*:—An insurance of goods in one building or locality is not an insurance of them in another building or locality; the removal of them from one place to another requires that which is tantamount to a new contract in order to preserve the insurance. Assuming that the plaintiffs might deal with the former agents as if they were still agents of the defendants, it could not justly be said that, before the loss, the plaintiffs had obtained a binding consent of the defendants to the change of locality, the burden of proof of which was upon the plaintiffs.

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ACTION upon a fire insurance policy.

January 16, 1911. The action was tried by SUTHERLAND, J., without a jury, at Toronto.

*Leighton McCarthy, K.C., and Frank McCarthy, for the plaintiffs.*

*H. Cassels, K.C., and R. S. Cassels, K.C., for the defendants.*

March 18, 1911. SUTHERLAND, J.:—The plaintiffs, a company incorporated under the laws of Florida, seek in this action to recover from the defendants, an insurance company with their head office at the city of Toronto, the sum of \$2,000, under the terms of a policy of insurance dated the 1st September, 1908, and numbered 200345. The stock of merchandise insured consisted of leaf tobacco and other materials then contained in a building situated on the south-east corner of Love and Washington streets, in the city of Quincy, Florida. The policy was issued in the city of New York, for the defendants, by a firm of insurance agents named Dickson & Tweeddale, who had some time before, under a verbal arrangement made with the defendants, become their agents there, and were in the habit of filling out and issuing the policies. They had been supplied with a rubber stamp facsimile of the name of the president of the defendant company, Robert F. Massie, for use as required.

In the month of October, the plaintiffs had applied for permission to transfer the policy so as to cover similar property while contained in another building owned by the Owl Commercial Company, situated east of and in the suburbs of the said city of Quincy. The course of procedure pursued on that occasion and attempted to be followed on the occasion in question was as follows:—

The plaintiffs applied to one McFarlin, an insurance agent at Quincy, and he in turn communicated with Ring & Co., a firm of insurance underwriters at New York, who had in the

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first instance procured the issuance of the policy to the plaintiffs. This policy was sent back to Ring & Co. by McFarlin, and received by them apparently on the 14th October, 1908. Ring, who is called, says that he probably dictated the indorsement by way of assignment.

Retaining the policy in their own possession, they sent the indorsement by one of their employees, called by one of the witnesses a "placer," to Dickson & Tweeddale. The indorsement was left with them, so as, when confirmed by the defendant company, to be handed back to Ring & Co., to be attached to the policy.

At the same time that the indorsement was left with Dickson & Tweeddale, what is known as a "binder" was secured from them; and the one in connection with the first assignment is said to be similar to the one in evidence and marked as exhibit 3. Such documents contain a dated memorandum of the proposed transfer, the number of the policy, and the name of the company, and are acknowledged in some form by the persons receiving the indorsement from the applicants or their representatives. These binders are temporary documents, to be held by the applicants, apparently, for a few days until the return of the policy, with the signed consent of the company to the indorsement agreeing to the transfer, and being intended, in the meantime, to hold the transfer as binding.

In the case of the October, 1908, transfer, Dickson & Tweeddale apparently used the rubber stamp already mentioned, as it appears at the foot of the indorsement as follows, "Robert F. Massie, Prest.;" and there are the initials "J. B. C." apparently verifying it, and said to be the initials of a man named Clark, then one of the managing underwriters of the New York State Department and in the service of the firm of Dickson & Tweeddale.

This indorsement did not apparently come to the knowledge of the defendants until about the 4th December, 1908. They did not then question it, because, though the notice only reached them after they had discontinued Dickson & Tweeddale's authority, they recognised that that firm had dealt with the matter before its revocation.

In connection with the said first assignment, Ring & Co.,

on getting the company's consent, signed in that way, to the indorsement, attached the latter to the policy, and returned both to McFarlin.

The defendants say that, on or about the 28th November, 1908, the business relations between them and Dickson & Tweeddale, having proved unsatisfactory, were verbally terminated by their president and manager, Massie, in New York. The accounts were settled between them, and he took away the stamp at that time. He says that never after that had Dickson & Tweeddale, or any one in their employ, authority to act for the defendant company. He admits that nothing was done in the way of advertising the revocation of that authority or to give notice to people who had dealt with the defendants through Dickson & Tweeddale, that it had been terminated. He says that the arrangement, being a verbal one in the first instance, was terminated in the same way at the end.

It is then said by the plaintiffs that shortly before the 14th January, 1909, desiring to secure a retransfer of the policy so as again to cover similar property in the premises where the merchandise originally was, viz., at the south-east corner of Love and Washington streets, they took the same course as before. They applied to McFarlin, and he to Ring & Co., again sending on the policy. A "placer" from Ring & Co. was again sent to the office of Dickson & Tweeddale, where, apparently, he came in contact with one August Schekira, an employee in their insurance office. Schekira at this time was twenty years of age, and says that, Clark having left the employment of Dickson & Tweeddale some time before, he discharged some of the duties Clark had previously been performing. He says he understood that Dickson & Tweeddale were still representing the defendants in New York, but had no knowledge of any contract. Neither Dickson nor Tweeddale was in the office on the 14th January, 1909, when Ring's "placer" came in and handed to Schekira an indorsement said to be in similar terms to the one now attached to the policy, and dated the 14th January, 1909. Schekira received the indorsement and filed it in the office of Dickson & Tweeddale, and initialled a binder, of which exhibit 3 is a copy, and which contains the following in writing across its face: "Transfer to cor. Love and Washington Sts., Quincy,

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Fla.;" and has printed across it the following: "The undersigned companies accept the above as per the amounts set opposite their respective names, and make the same binding from foregoing written date, subject to conditions of policy issued by respective companies. Void on delivery of policy to Charles E. Ring & Co." It also has in writing the following: "Company, Dominion, No. 200345. A.C.S."—the A.C.S. being Schekira's initials.

Schekira admits that he did this without consultation with or any direct authority from either Dickson or Tweeddale. He also admits that he did not communicate with the defendants with respect to the indorsement put on file, as that was not in the line of his duties.

It appears that in a few days the firm of Dickson & Tweeddale came to grief, and he left its employment. The defendants' manager says that no word of the binder in question or the said indorsement ever came to the knowledge of the defendants until after this suit was commenced. He also says that he knew of Schekira only as a junior clerk in Dickson & Tweeddale's office.

Ring testified, in the course of his evidence, that his firm endeavoured from time to time to get from Dickson & Tweeddale the indorsement ratified by the company, but were unable to do so. It is not shewn, however, in what way this was being done. It would seem that, if either Dickson or Tweeddale had been applied to, Ring & Co. would have been informed that they no longer had authority to act for the defendant company. The efforts of Ring & Co. to secure the signing of the indorsement never came to the defendants' attention. Ring says that, under these circumstances, about the 7th March, 1909, he met one Stinson, of the insurance brokers' firm of McLean Stinson & Co. Limited, Toronto, at Niagara Falls, and gave him a duplicate of the indorsement which had been given by his "placer" to Schekira on the 14th January, and at the same time handed him the policy. He says that the first indorsement was never got back from Dickson & Tweeddale.

Apparently, Stinson did not deliver to the defendants or bring the indorsement given to him by Ring to their attention for some time after receiving it.

On the 19th March, 1909, the fire occurred in the premises

on the south-east corner of Love and Washington streets, and the insured property is said to have been totally destroyed. On that same day, Ring telegraphed to McLean Stinson & Co. Limited as follows: "Has Dominion policy covering Kline Brothers given Mr. Stinson been indorsed? Wire immediately."

He is not clear whether he did this before or after learning about the fire. He learned of it on that day. He speaks of having written a letter a couple of days before to McLean Stinson & Co. Limited about the matter of the indorsement, but it is not produced. It appears very likely that this telegram was sent in consequence of learning of the fire.

On the following day, the 20th March, McLean Stinson & Co. Limited sent the renewal indorsement to the defendants, enclosed in a letter; and, not having received any acknowledgment thereof, wrote again to the defendants on the 25th March as follows: "Some time ago we forwarded to you an indorsement to be attached to policy 200345, Kline Brothers Company. As we would like to dispose of this matter, we would ask you to kindly let us have this as soon as possible, and oblige."

Neither Ring & Co. nor McLean Stinson & Co. Limited (if the latter knew of the fire, which does not appear) had meantime apprised the defendants thereof, and they were not otherwise aware of it. Their secretary, Neil W. Renwick, under these circumstances, subsequent to the fire, and thinking the matter was purely a formal one, without even changing the date of the indorsement as drawn, viz., the 14th January, 1909, stamped with a rubber stamp the name of the defendant company at the foot of the indorsement and signed as secretary.

On the 27th March, 1909, Renwick returned to McLean Stinson & Co. Limited the indorsement, enclosed in a letter in the following terms: "We are returning herewith removal indorsement as forwarded in your favour of the 20th. We have completed the same and altered our records accordingly."

Under these circumstances, the defendants are contesting the policy

The plaintiffs have apparently, and upon the evidence, sustained loss entitling them otherwise to make and maintain their claim, if the policy was at the time of the fire in force so as to cover goods in the original premises.

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It is admitted by the defendants that Dickson & Tweeddale had authority to issue the policy in the first instance, and that it was in force at the time of the fire, in so far as covering goods in the Owl Commercial Company building.

I do not think that the binder left by the "placer" with Schekira on the 14th January, 1909, was of any force. The arrangement or contract referred to therein was never indorsed on or added to the policy. It states that it is attached to and forms a part of the policy in question. It was never so attached, and neither Schekira nor Dickson & Tweeddale nor the defendants ever had the policy in their hands to which to attach it. Neither Dickson & Tweeddale nor Schekira, at the time it was initialled by the latter, any longer had any authority to act in any way for the defendants. I do not think Schekira at any time had. I referred to his evidence. But, in the absence of any testimony by either Dickson or Tweeddale, I cannot see or hold that he had authority to bind them, let alone the defendants: *Walkerville Match Co. v. Scottish Union and National Insurance Co.* (1903), 6 O.L.R. 674, and cases therein cited.

Not only did the binder then, in my opinion, have no effect, but the indorsement left with Schekira never came to the knowledge of the defendants, nor was ratified by them.

As to the second indorsement, it is clear that, at the time the fire occurred, it had not been brought to the attention of the defendants nor ratified by them. It was the duty of the plaintiffs, who knew of the fire, at once to notify the defendants. They do not appear from the correspondence to have done this until after they had obtained the alleged consent of the defendants as indicated. It was also, I think, the duty of Ring, when he learned of the fire, to notify the defendants. It is plain that the defendants had given no consent of any kind to the re-transfer at the time of the fire. There was, at that time, no binding contract between the parties to re-transfer. But, it is said, by the plaintiffs, that the defendants subsequently ratified the indorsement, and are bound; and in this connection they point to the fact that the indorsement bears date on its face the 14th January, 1909. I do not think that that date can affect the matter. The alleged ratification admittedly was not given on that date. The only reason that the date was left unaltered,



and the real date not inserted, was because it was treated by the official of the defendants as a mere matter of form. The real date of the alleged ratification was subsequent to the date of the fire. But such alleged ratification was made under a mistake of fact, and in ignorance that, at the time, the merchandise in question had been destroyed by fire. Apart from such alleged ratification, the policy was then covering no merchandise in the premises on the corner of Love and Washington streets, and the plaintiffs could claim no benefit as to insurance under the policy in question on the same.

I do not think that the alleged ratification is binding on the defendants, under these circumstances. The defendants cannot, I think, be said to have waived their right to object to the alleged ratification, when it is apparent that it was obtained without their knowledge of the fire, and with that fact known to the plaintiffs and their agent and withheld: *Nippolt v. Firemen's Insurance Co. of Chicago* (1894), 59 N.W. Repr. 191; *Western Assurance Co. v. Doull* (1886), 12 S.C.R. 446, at p. 455; *Grover & Grover Limited v. Mathews*, [1910] 2 K.B. 401.

There will be judgment for the defendants with costs.

The plaintiffs, by consent of the defendants, appealed directly to the Court of Appeal from the judgment of SUTHERLAND, J.

November 20, 1911. The appeal was heard by Moss, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, J.J.A.

*Leighton McCarthy*, K.C., and *Frank McCarthy*, for the plaintiffs. The defendants are bound by the "binder" dated the 14th January. This binder was obtained in the ordinary course of business from A. C. Schekira, a clerk in charge of the office of Messrs. Dickson & Tweeddale, who were the agents who issued the policy to the plaintiffs in the first instance. It was through Dickson & Tweeddale that the transfer of the 14th October was effected by J. D. Clark, the predecessor in office of A. C. Schekira. The binder in question was obtained in the usual course of business. The indorsement was not obtained at the time, owing to the unsettled condition and the subsequent closing on the 23rd January of the office of Dickson & Tweeddale. The plaintiffs and the clerk Schekira had no knowledge whatever of the discontinuance of the agency of Messrs. Dickson & Tweeddale for

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the defendants. There had been no notification or publication whatever of the fact: Halsbury's Laws of England, vol. 1, p. 158; Story on Agency, 9th ed., p. 505, sec. 443; Campbell's Ruling Cases, vol. 2, p. 357; *Insurance Co. v. McCain* (1877), 96 U.S. 84, at p. 86; *McNeilly v. Continental Life Insurance Co.* (1876), 66 N.Y. 23; *Campbell v. National Life Insurance Co.* (1874), 24 C.P. 133, at p. 144; Clement on Fire Insurance, vol. 2, pp. 458 (rule 25), 467, 469 (rule 43), and 470 (rule 44). As to the contention that Dickson & Tweeddale could not delegate the authority to Schekira, see Clement at p. 470; *Rossiter v. Trafalgar Life Assurance Association* (1859), 27 Beav. 377; *Goode v. Georgia Home Insurance Co.* (1895), 23 S.E. Repr. 744, at p. 745. The fire occurred on the 19th March; but, so far as the evidence discloses, neither Stinson nor the defendants had any knowledge of the fire until after the 26th March. It is clear, on the evidence, that such transfers are purely formal matters. The transfer of the 14th October was accomplished by means of a rubber stamp, and the defendants had no notice thereof until the 4th December. The indorsement obtained in March was put through the head office in a most informal manner. It is admitted that Dickson & Tweeddale were general agents of the defendant company; that they had authority to issue the policy in question; and that they had authority to effect the transfer of the 14th October. The transfer was duly effected, and the policy covered the property destroyed in the place in which it was destroyed; and the indorsement obtained, as is the usual practice, in March, dated the 14th January, ratified and confirmed the binder of the same date and as such is binding on the defendants: Cooley's Briefs on the Law of Insurance, 1905 ed., vol. 1, p. 535; *Putnam v. Home Insurance Co.* (1877), 123 Mass. 324; *Marsden v. City and County Assurance Co.* (1866), L.R. 1 C.P. 232; *Canada Fire and Marine Insurance Co. v. Western Insurance Co.* (1879), 26 Gr. 264. If Dickson & Tweeddale were in the position for which we contend, then *Hawthorne v. Canadian Casualty and Boiler Insurance Co.* (1907), 14 O.L.R. 166, governs.

*H. Cassels*, K.C., for the defendants. The judgment appealed from is right, and should be affirmed. It is admitted by the plaintiffs that the insurance policy in question was transferred in October, 1908, so as to cover property while contained in a

building known as the Owl Commercial Company's warehouse; and that, unless there was a further valid transfer, the policy did not cover the property which was burnt. There was, I submit, no valid transfer of the insurance. The plaintiffs rely in the first place on the transfer assented to by the defendants in Toronto on the 26th March, 1909; and, in the alternative, on the informal assent given in New York on the 14th January, 1909; but neither the formal assent nor the informal assent is valid or binding on the defendants. The formal assent is invalid because it was given after the fire had occurred, without knowledge by the defendants of that fact, and with knowledge but non-disclosure by the plaintiffs of that fact: *Western Assurance Co. v. Doull*, 12 S.C.R. 446; *Hendrickson v. Queen Insurance Co.* (1871), 31 U.C.R. 547. The assent given in New York is also invalid because the agency of Dickson & Tweeddale had been terminated before that assent was given by their clerk, and neither they nor any one in their employ had at that time any power to bind the defendants in any way: *Pigott v. Employers' Liability Assurance Corporation* (1900), 31 O.R. 666. Even if the agency of Dickson & Tweeddale had not been terminated, the assent alleged to have been given by the clerk Schekira would not have been binding on the defendants. Dickson & Tweeddale had not assumed to delegate to him, and could not delegate to him, the discretionary power which, if the agency had not been terminated, would have been vested in them, and Schekira had no authority in writing to represent the defendants and no implied authority to act on their behalf: *Summers v. Commercial Union Assurance Co.* (1881), 6 S.C.R. 19; *Canadian Fire Insurance Co. v. Robinson* (1901), 31 S.C.R. 488; *Lount v. London Mutual Fire Insurance Co.* (1905), 9 O.L.R. 699. Then, too, the assent alleged to have been given by Schekira was at most a temporary assent, for the convenience of Charles E. Ring & Co. No notice of it was given to the defendants; and, in any event, it lapsed and came to an end long before the fire occurred: *Nippolt v. Firemen's Insurance Co. of Chicago*, 59 N.W. Repr. 191; *Grover & Grover Limited v. Mathews*, [1910] 2 K.B. 401; *Skilling v. Royal Insurance Co.* (1903), 6 O.L.R. 401; *Dohmen Co. Ltd. v. Niagara Fire Insurance Co. of City of New York* (1897), 71 N.W. Repr. 69; *Mead v. Phenix Insurance*

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Co. (1893), 158 Mass. 124; *Hamblet v. City Insurance Co.* (1888), 36 Fed. Repr. 118; *Burlington Insurance Co. v. Campbell* (1894), 60 N.W. Repr. 599.

*McCarthy*, K.C., in reply. The evidence shews that Dickson & Tweeddale had notice of the transfer.

February 15, 1912. GARROW, J.A.:—Appeal by the plaintiffs from the judgment at the trial, of Sutherland, J., who dismissed the action.

The action was brought to recover the sum of \$2,000 upon an insurance policy issued by the defendants in favour of the plaintiffs, whereby the defendants agreed to insure the property of the plaintiffs contained in a building in the city of Quincy, in the State of Florida, for one year, against loss by fire.

The facts are set out very fully in the judgment of Sutherland, J.; and, as I agree in the result, I do not think it necessary to repeat them at any length.

As will be seen, Sutherland, J., in dismissing the action, proceeded upon two main grounds: (1) the absence of authority in Mr. Schekira, the clerk in the defendants' New York agents' office, to consent for the defendants to a transfer, or even to issue a "binder;" and (2) that the consent to the transfer obtained at the defendants' head office at Toronto, after the fire, could not be upheld, it having been given in ignorance that a fire had occurred.

The second conclusion seems to be undoubtedly correct. The fire had completely altered the relation of the parties, and had fixed their respective rights and obligations under the contract as it then stood: see *Skillings v. Royal Insurance Co.*, 6 O.L.R. 401, at p. 405. That the consent was antedated is, I think, of no consequence. The defendants cannot, under the circumstances, be assumed to have intended thereby to ratify the "binder" issued by Mr. Schekira, of which, upon the evidence, it is clear that they then knew nothing.

As to the other ground, I have had more difficulty. The defendants' agents, Dickson & Tweeddale, consented to the earlier transfer, with the apparent approval of the defendants. That transfer was put through the agents' office by Mr. Clark, an employee, and initialled upon its face by him, and not by the agents themselves or either of them. This the defendants must

be assumed to have known when they received particulars of the transfer on the 4th December following. Nor does Mr. Massie, the defendants' president, when called as a witness, disapprove of what was then done, either by the agents or by Mr. Clark as their employee. There is no evidence that Mr. Clark was appointed in writing. So far as appears, he may have been appointed exactly as Mr. Schekira was. When Mr. Clark left the employment, Mr. Schekira, who had acted as Mr. Clark's assistant, continued to discharge his duties with respect to such transactions, which were not at all unusual. Mr. Schekira had so acted for several weeks before the date of the "binder" in question, and had in that time put through several for the other companies represented by Dickson & Tweeddale, although this happened to be the first for the defendant company. That he was so acting must have been known and approved by Dickson & Tweeddale, who, if they did not expressly appoint him to succeed Mr. Clark, at least did not appoint any one else to do so.

The case is not, I think, governed by the case in this Court of *Walkerville Match Co. v. Scottish Union and National Insurance Co.*, 6 O.L.R. 674. That was the case of a small local agency. This is the case of a single exclusive agency doing a large business, in a foreign jurisdiction, for it is not shewn that the defendants had any other agent in or for the city, or even for the State of New York. Such an agency has been, not unreasonably, held, in this Province, to stand, as to its authority to bind its principals, at least in some respects, in the position of the head office: see *Campbell v. National Life Insurance Co.*, 24 C.P. 133, at p. 144. In such an office in a great city like New York, and in an office doing the extensive business done by Dickson & Tweeddale, it could not reasonably be expected that the agents would do everything personally. But what would be expected, and what would be reasonable, it seems to me, would be, that the business, while carried on under their general supervision, would be managed, as to details, with the aid of subordinates such as was Mr. Clark, and, after him, Mr. Schekira. And a policy-holder, acting in good faith, would not, I think, be bound to see that such subordinates had been duly or efficiently appointed, if they were apparently acting within the scope of an ostensible authority. The plaintiffs had dealt in a similar manner

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with one subordinate, Mr. Clark, with the apparent approval of the defendants, and I incline to think that they were equally justified in the subsequent dealing with Mr. Schekira, who, although a young man and less experienced than Mr. Clark, was apparently performing the same duties in the agents' office with respect to such transactions as the one in question.

I am also of the opinion that the secret cancellation of the agents' authority does not affect the matter. Such agencies cannot be terminated in that summary way to the prejudice of customers who continue to deal with the office in good faith and without notice.

In the result, the "binder," in my opinion, should be regarded as if, when it was given, Dickson & Tweeddale had continued to be the defendants' agents and had themselves given it.

But this by no means ends the plaintiffs' difficulties. The "binder," it is clear upon the evidence, is only intended to be in force pending the production of the policy and a proper indorsement thereon of the change in the contract. The policy contains a provision that no officer or agent shall have power to waive the provisions or conditions of the policy, unless such waiver is written upon or attached to the policy, and that no privilege or permission affecting the insurance under the policy shall exist or be claimed by the insured unless so written or attached. Granting the temporary "binder" seems to have become a practice, not actually warranted by the usual contract of insurance, owing to the exigency of the haste with which business is now transacted. But it is clear, and it is not unreasonable, that the formal completion should, in the interests of both parties, take place without unnecessary delay. No actual time for doing so is stated, either in the "binder" or by the witnesses who describe the practice. The assured holds the policy. The next step must, therefore, come from him. He would be bound to produce the policy to the assurer for the purpose of having the further formal indorsement made. And this, I think, he would be bound to do within a reasonable time: see *Scammell v. China Mutual Insurance Co.* (1895), 164 Mass. 341, and *Thompson v. Adams* (1889), 23 Q.B.D. 361, where cognate subjects are discussed. What is a reasonable time is, of course, a question of fact; and, with every desire to put no unnecessary

obstacle in the plaintiffs' way in seeking to recover what appears to be an honest claim, I find it quite impossible to hold that they, and those for whom they are responsible, acted otherwise than with great, unnecessary, and inexcusable delay. Ring & Co., their agents at New York, knew before the end of January that Dickson & Tweeddale had, through financial difficulties, been closed up. That was matter of newspaper notoriety. They must have known where the head office was, and might have applied there, but did not. On the 7th March, at Niagara Falls, they handed to Mr. Stinson, an insurance agent residing in Toronto, the policy and formal transfer, to obtain from the defendants at their head office the necessary indorsement, which, as subsequent events shewed, could have been easily obtained; but, for some wholly unexplained reason, Stinson did nothing until the day after the fire. The result is, that, through no fault of the defendants, the requisite indorsement upon the policy was not made in time. And they are, therefore, now in a position, successfully in my opinion, to set that up as a defence to the action.

The appeal should, in my opinion, be dismissed with costs.

MEREDITH, J.A.:—An insurance of goods in one building or locality is not an insurance of them in another building or locality; the removal of them from one place to another requires that which is tantamount to a new contract in order to preserve the insurance: see *Pearson v. Commercial Union Assurance Co.* (1876), 1 App. Cas. 498.

The goods in question were moved from the place and building in which they were insured to another place and building, and were there destroyed by fire; and, therefore, the plaintiffs can recover in this action, upon the policy of insurance, only if they had procured, before the fire, that which was tantamount to insurance of the goods in the place and building where they were so destroyed.

They took steps with that object in view; but had not, in my opinion, accomplished it when the fire took place.

Their first step was, through their agents, an application to a co-partnership firm in the city of New York, who had been the New York agents for the defendants, but had some time

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before ceased to be their agents, and were in difficulties which brought their business to a close soon after; the application was made in writing upon a form, called a "binder," which, upon its face, is singularly inappropriate; being in the form of an application for insurance, which form, when accepted, becomes that which is in this Province always called an "interim receipt," constituting a binding contract of insurance, subject to the conditions of the policy to be issued upon it. But no premium or consideration was given, nor any readjustment in any respect attempted; so that it is quite plain that all that ought to have been sought, and given, was the assent of the company to change of the locality of the goods insured; and the main difficulty I find in the plaintiffs' way to success in this action is, that that was not done, and the defendants cannot be bound, especially on the facts of this case, by intentions or by what ought to have been done, not carried into effect.

The application was presented to a young man, who was at the time in charge of that branch of the New York firm's business to which the application would, in the ordinary course of business, be made; but he was little experienced, and the business was, as I have intimated, in a stage approaching collapse. Without inquiry, except to see that the application came from a reputable insurance broker, he, without consulting any one else in the office, initialled the application, which the broker retained, and placed another, I suppose a duplicate, "on the file in the office" of his masters.

While the same policy was in force, another change of locality of the goods had taken place previously, and had been duly assented to by the defendants: the change in question was a removal of the goods back to the place where they were when the insurance upon them was first effected. On this occasion, the procedure adopted seems, from the evidence, to have been of a different character: according to the testimony of the broker on the first occasion, an indorsement of the policy giving consent to the change was drawn by him, signed by the company, through their New York agent, and attached to the policy by him, and returned to the plaintiffs. But, however this may be, when consent to the second change was sought, all concerned say—the brokers and the New York firm's clerk both say so



very plainly—that the indorsement upon the policy could not be made by the New York firm; that, at that time at all events, it must be procured from the defendants, as it afterwards was, but not until after the loss.

Assuming, as I do, that, in the circumstances of this case, the plaintiffs might deal with the New York firm, as to this insurance, as they did, as if still agents of the defendants, because no notice of their discharge had been given, I am yet unable to perceive how it can rightly be found that any consent of the defendants to change of locality had been obtained before the loss. Whatever the persons concerned intended to do or should have done, no such consent was actually given; all that was done was the presenting of the application in writing and the initialling of it, and placing it upon the file, as I have mentioned, by the New York firm's clerk; no indorsement was made; the character of the "binder" was, on its face, entirely different from that of the indorsement which had previously been obtained, and which would be the usual mode of evidencing consent to such a change; and no knowledge of the change came to the defendants until late in the month of March, more than three months after the "binder" transaction took place; and, as I have before intimated, the New York firm, having actually no sort of authority to act for the defendants at that time, ought not to be given any binding power, by reason of any ostensible power, beyond that which they actually exercised; which is in writing, and which was exercised only through the ignorance of their clerk.

As the plaintiffs' claim seems to me morally a just one, that is, they have, through misfortune only, lost their goods, one may regret that they should also lose their indemnity, through nothing but want of ordinary care and business method; but I am quite unable to perceive how it can justly be said that, before the loss, they had obtained a binding consent of the defendants to the change of locality of the goods, the burden of proof of which is upon them; and, if that be so, they rightly failed in this action at the trial.

MOSS, C.J.O., MACLAREN and MAGEE, JJ.A., agreed in the result.

*Appeal dismissed.*

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## [DIVISIONAL COURT.]

## RE WEST NISSOURI CONTINUATION SCHOOL.

*Schools—Township Continuation School—District Established by County Council—Application of School Board for Funds to Provide School House—By-law—Attempted Repeal—Powers of Council—Continuation Schools Act, 9 Edw. VII. ch. 90, secs. 5, 7(3)—High Schools Act, 9 Edw. VII. ch. 91, sec. 38—Approval of Application—Finality—Mandamus—Demand and Refusal—Necessity for—Sufficiency—Application for Funds for Maintenance.*

The County Council of the County of Middlesex having, under the Continuation Schools Act, 9 Edw. VII. ch. 90, sec. 5, established the whole Township of West Nissouri as a continuation school district, and the continuation school board having made an application to the township council to issue debentures for the purpose of raising \$7,000 for the purchase of a school site and the erection of a school house, the township council passed a by-law providing for raising \$7,000 by debentures. The council afterwards assumed to repeal this by-law by another by-law:—

*Held*, that the council, by the first by-law, had approved the application, under the provisions of 9 Edw. VII. ch. 91, sec. 38 (made applicable to continuation schools by sec. 7(3) of the Continuation Schools Act), and had no power to change or reverse that approval; and it then became the duty of the council, under sec. 38(4), to raise the sum required.

*Held*, however, that a mandamus to the council to raise and pay over the \$7,000 to the school board could not be granted, because it was not shewn that a proper demand had been made by the board and refused by the council.

Order of MIDDLETON, J., reversed and motion for mandamus dismissed, but without prejudice to another application, after formal demand.

The council assumed to repeal the first by-law because the reeve and most of the councillors believed that they were elected to oppose the establishment of a continuation school:—

*Semble*, per MIDDLETON, J., that this was an improper attitude on the part of the township council, for they had no power to review the action of the county council; but, per RIDDELL, J., that there was no impropriety in raising such an issue at a municipal election, or in making the attitude of a candidate upon that issue the test of whether he should be voted for; the people were to pay for a school, if established, and they had a right to express their views by their votes, if they saw fit; and the council had a right to do all they could lawfully to carry out the mandate of their constituents.

A document, under the seal of the school board, and signed by the chairman and secretary-treasurer, was served upon the township council, demanding \$1,000 for the maintenance of the school. Later, the chairman and other members of the board attended a meeting of the council and urged the council to raise and pay over the \$1,000 to the board. Another demand was subsequently made at a meeting of the council by a member of the board acting for the board, and he was then (as he said) "told by the reeve, in the presence of the councillors, that we could go to the Courts and get our money:—"

*Held*, that, upon this application, there was a sufficient demand and refusal, and the board were entitled to a mandamus for payment of the \$1,000.

All that is necessary in order that a mandamus may issue is to satisfy the Court that the party complained of has distinctly determined not to do what is demanded.

Order of MIDDLETON, J., affirmed.

MOTION by the Trustees of the West Nissouri Continuation School for: (1) a mandamus to compel the Council of the Township of West Nissouri to raise the sum of \$7,000 and pay the same to the school treasurer, or to issue debentures for that amount, under township by-law No. 208, and pay the proceeds to the treasurer, for the purpose of erecting a school building; and (2) a mandamus to compel the council to pay \$1,000 for maintenance of the school.

December 16, 1911. The motion was heard by MIDDLETON, J., at the London Weekly Court.

*W. R. Meredith*, for the applicants.

Sir *George Gibbons*, K.C., and *G. S. Gibbons*, for the township corporation.

January 2, 1912. MIDDLETON, J.:—This is an unfortunate contest between a municipal council and a school board, in which the council, quite forgetting the limitation of its sphere, seeks to review the action of the school board and to protect the ratepayers from the action of that board. As put by the Reeve: "A very large proportion of the ratepayers of the township are opposed to the establishment or maintenance of a continuation school in the said township, as I verily believe, and myself and other councillors opposed to the establishment of such school were elected by a large majority on that issue. . . . Knowing the feeling of the ratepayers in this regard, the majority of the councillors felt it to be their duty to prevent, if possible, the establishment of the said school against the will of the people who have to maintain the same."

Nothing can be more improper than this attitude on the part of the township council. In our complicated system of municipal government, each subordinate body is supreme within its own limits; and municipal government cannot be carried on if one of these subordinate bodies, not content with its own supremacy within the ambit of its own jurisdiction, seeks to interfere with matters outside its jurisdiction, and, sitting as a self-constituted court of review, to render nugatory the action of other representative bodies with which it, in its wisdom, does not agree.

The Reeve and his associates are quite wrong in seeking to answer this application by the assertion that they and the rate-

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payers do not approve of a continuation school. That question is one over which they have no voice or control. "The council of a county with the approval of the Minister may establish in any township, town or village in the county one or more continuation schools:" sec. 5 of the Continuation Schools Act, 9 Edw. VII. ch. 90; and this action cannot be reviewed by the township.

It is the duty of the Court to prevent this invasion by one municipal body of the legislative territory assigned to another, and to compel the discharge by one municipal body of any duties which it may be called upon to discharge, which are merely ministerial and ancillary in their natures.

The Legislature has seen fit to provide that school affairs shall be in the hands of the school boards and shall not be in the hands of the municipal council, and at the same time has provided that the municipal council shall be the hand by which the money required for school purposes shall be raised. "The council . . . shall levy and collect in each year such amount as the board may deem necessary for the maintenance of the school:" sec. 7 (9 Edw. VII. ch. 90). "Where the sum required by a board for permanent improvements" (which includes the erection of a school house, by sec. 2 (1) (k), "the same shall be raised on the application of the board" (9 Edw. VII. ch. 91, sec. 38, made applicable to continuation schools by sec. 7 (3) of the Continuation Schools Act), unless the council exercise the special limited statutory rights given by sub-sec. 3 *et seq.* At the first meeting after the receipt of the requisition or so soon thereafter as possible, the council shall "consider and approve or disapprove the same;" and, if it disapproves, it shall, on the request of the board, submit the question to the ratepayers.

The question was considered by the council, and the council approved of the application, and it then became the duty of the council to pass a by-law in accordance with the requirements of sec. 38, and to issue and sell the debentures and pay over the proceeds to the school board.

In compliance with this duty, the by-law 208 was passed. On the attack upon its validity, the council, properly enough, did nothing pending the litigation. In August last, a change having taken place in the views of the council, by-law No. 216 was passed, by which 208 was repealed. It is now said that this destroys

the rights of the board. I think not. The right to approve or disapprove was one which the municipality was called on to exercise, once and for all, immediately after the receipt of the requisition; and, when approved, the council was bound to do then all necessary for the raising of the money. It may well be that by-law 208 does not contain provisions that are now suitable, and that its repeal is necessary to enable the financial problems to be worked out; but, it seems to me, I am not concerned in this in any way.

I think a mandamus should go directing the township corporation to discharge the duty devolving upon them under sec. 38, in view of the approval of the application of the board, by the issue of debentures and by the passing of the necessary by-law therefor, and to pay over the proceeds to the school board when the debenture shall have been sold.

The mandamus should direct the doing of this forthwith, but no motion of a punitive character should be made if reasonable diligence is shewn, and the matter is taken up and proceeded with at the first meeting of the new council in 1912.

The mandamus should be directed to the corporate body, and not to the individuals, though the individuals were properly notified. See *Re Bolton and County of Wentworth* (1911), 23 O.L.R. 390.

Another motion for a mandamus is made, based upon a requisition for \$1,000 for maintenance. This motion has been pending for some time owing to the litigation between Henderson and the township corporation, and the corporation now say that they have no money with which to pay.

Section 7 (1) of 9 Edw. VII. ch. 90 makes it the duty of the council to levy the amount necessary for the maintenance of the school. The school year does not expire with the calendar year; and I can see no reason which will prevent the council from levying the sum necessary to enable the board to carry on its work for the current school year.

I am not concerned with any difficulty the township corporation may be in by reason of their default, and leave them to work out the situation as best they can. The school trustees had the right of determining without question the amount to be raised for school purposes within the municipal limits, and of author-

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itatively calling upon the municipal authorities to collect and hand over that amount, and the municipal authorities are under an absolute obligation to obey the behests in that regard of the school trustees. See *per* Sedgewick, J., in *Canadian Pacific R.W. Co. v. City of Winnipeg* (1900), 30 S.C.R. 558, 563.

A preliminary objection was taken that the affidavits were not filed in the proper office. They were in fact filed and in the custody of the Court; copies were demanded, and they have been answered, and the motion was enlarged without any objection being taken. If this does not amount to a waiver (in my view it does), I think I have power to allow the affidavits to be marked by the proper officer *nunc pro tunc*.

The township corporation must pay the costs of both motions.

The township corporation appealed from the order of MIDDLETON, J..

January 23. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

Sir George Gibbons, K.C., and G. S. Gibbons, for the appellants. As to the granting of a mandamus to compel the payment of \$7,000, there is no evidence to support the finding of fact upon which the conclusions of the learned Judge below were founded, that there had been a demand amounting to a corporate act of the board for the moneys in question, with which the corporation would be bound to comply. They referred to *Re Oakwood and Township of Mariposa* (1888), 16 A.R. 87, at p. 92; *Re Peck and County of Peterborough* (1873), 34 U.C.R. 129; 9 Edw. VII. ch. 91, sec. 38; Halsbury's Laws of England, vol. 10, pp. 78, 98, and 101. In regard to the granting of a mandamus to compel the appellants to pay \$1,000 for maintenance of the school, it has been clearly shewn that the performance of the duty sought to be enforced was impossible, at the time demanded, by reason of want of funds; and that a mandamus would not be granted when it could not be enforced. They referred to *In re Bristol and North Somerset R.W.Co.* (1877), 3 Q.B.D. 10; *Holmes v. Town of Goderich* (1902), 5 O.L.R. 33; *Re Oakwood and Township of Mariposa, supra*, at p. 90; 3 Edw. VII. ch. 19, sec. 435, sub-sec. 4. By-law 208, enacted by the former council, had been repealed.

*T. G. Meredith, K.C., and W. R. Meredith*, for the respondents. In regard to the objection that a corporate demand should have been made for the \$7,000, such a demand was made in the first place, and that was sufficient. The *Oakwood and Mariposa* case is rather in favour of the respondents, and the *Peck and Peterborough* case does not shew a corporate act to be necessary in order to get the money. As to the \$1,000 for maintenance, a mandamus should certainly lie. It was the proper remedy: *Toronto Public Library Board v. City of Toronto* (1900), 19 P.R. 329. The school board had a perfect right to ask for the money for improvements. The money could be borrowed and paid over to the board. Counsel referred to 9 Edw. VII. ch. 90, sec. 7, as being the governing section. They contended that the judgment appealed from was right and should be affirmed.

*Sir George Gibbons*, in reply.

February 16. RIDDELL, J.:—The County Council of the County of Middlesex, on the 27th January, 1910, under the Continuation Schools Act, 9 Edw. VII. ch. 90, sec. 5, established the whole Township of West Nissouri as a continuation school district. There was much opposition to this in the township—and a motion was made to quash a by-law of the township passed the 1st June, 1910, based upon the resolution. The motion failed; Middleton, J., dismissed it: *Re Henderson and Township of West Nissouri* (1910), 23 O.L.R. 21, at p. 22; that judgment was affirmed by a Divisional Court, 23 O.L.R. 21, at p. 25, and by the Court of Appeal, 24 O.L.R. 517, on the 29th September, 1911. Application was made to the Supreme Court of Canada for leave to appeal, and leave was refused.

The township by-law referred to, *viz.*, by-law No. 208, recited: "And whereas the Municipal Council of the Township of West Nissouri have approved of the application or requisition for the said moneys . . ."—this referring to a previous recital—"Whereas a requisition has been made by" the Township of West Nissouri Continuation School Board "for the issue of \$7,000 debentures for the purchase of a school site and the erection of a school house for the Township of West Nissouri Continuation School." The by-law No. 208 provided for raising \$7,000, by debentures of not less than \$100 each, payable in twenty years

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after the day upon which the by-law took effect, and interest payable yearly at five per cent., coupons to be attached for that purpose—the by-law to take effect on the 15th December, 1910.

The proceedings resulting in the by-law were, of course, taken under the provisions of 9 Edw. VII. ch. 91, sec. 38, which provides for an application by the board; and (3) that the council shall, at its first meeting after receiving the application, or as soon thereafter as possible, consider and approve or disapprove the same. It is abundantly manifest that the council did approve the application; and, had no motion been made to quash the by-law, no doubt the money would have been raised and paid over to the school board.

After judgment had been given in the Divisional Court, and while an appeal was pending to the Court of Appeal, the township council, on the 20th July, 1911, passed by-law No. 216, which, reciting the proceedings in the Courts, and that “the majority of the rate payers of the Township of West Missouri are desirous of having submitted to them the desirability of issuing debentures for the purpose of purchasing a site and erecting a school house for the continuation school in the said township,” then proceeded to repeal by-law No. 208. This was because the Reeve and most of the council believed that they were elected on the issue raised at the election of opposing the establishment of a continuation school. I can see no impropriety in raising such an issue at the municipal election, or in making the attitude of a candidate upon that issue a test or the test of whether he should be voted for. The people were to pay for a school, if established, and they had a right to express their views by their votes, if they saw fit. More than one Provincial election has been lost and won on Dominion issues. And the council have a perfect right to do all they can *lawfully* to carry out the mandate of their constituents.

But, as the Legislature gave the power to the council to approve or disapprove only “at its first meeting after receiving the application, or as soon thereafter as possible,” it is obvious that, once the council had approved (as it undoubtedly did in June, 1910), no power was left in the council which would enable it to change or reverse that approval. Accordingly, by-law No. 216 does not affect the approval.



The approval having occurred, sec. 38 (4) applies; and it became the duty of the council to "raise the sum required by the issue of debentures in the manner provided by the Consolidated Municipal Act, 1903."

All parties are agreed that the council is blameless in not raising this money until the motion made to quash by-law 208 was finally disposed of, about October or November, 1911.

But on the 20th March, 1911, a document, under the seal of the school board, and signed by the chairman and secretary-treasurer, was served upon the council, in the following terms:—

"To the Municipal Council of the Township of West Nissouri. The Trustees of the West Nissouri Continuation School Board require of you the sum of \$1,000 on account for the sum applied for for the maintenance dated 15th day of March, 1911. In witness whereof," etc., etc., etc.

On the 27th March, by a similarly executed document, the school board notified the council "that they withdrew that portion of their claim submitted in their estimate on the 20th day of March, being the issue of \$500 demanded for equipment, including library, chemical and physical apparatus." Nothing turns upon this withdrawal, as it refers to an item specifically for library, etc., in the estimates—the whole estimates for maintenance and permanent improvements being \$3,570.

Nothing was done on the demand, and on the 5th April, the chairman and others of the board attended a meeting of the council and urged the council to raise and pay over the money to the board, as the board intended to open a school at once, and it was necessary that they should have funds in order to carry on their work. They were informed by the Reeve, in presence of the council, that the matter should be referred to the township solicitor for advice. It is sworn and not disputed that the \$1,000 was required for the purpose of the school and in order that the school should be started.

Subsequently, and on the 3rd May, a member of the school board appeared for the board at a meeting of the council, and "demanded from them that they should pay to the school board the moneys required by the board under their written requisitions, and I was told by the Reeve, in the presence of the councillors, that we could go to the Courts and get our money." Letters were

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written by the solicitors for the board to the members of the council, on the 7th April and the 15th April, demanding the payment of the \$1,000. No answer was given to these letters, so far as appears.

Finally, a motion was launched by the board for a mandamus to compel the township to pay the board the \$1,000—this was apparently abandoned, as the applicants did not appear on the return; and the Chancellor made an order, on the 16th June, dismissing it with costs, but without prejudice to a renewal of the application. The motion was reinstated by the Chief Justice of the Common Pleas on the 22nd June; it came on for hearing on the 20th October, but was enlarged pending application, in *Re Henderson and Township of West Nissouri*, to the Supreme Court of Canada for leave to appeal. Notice was served on the 6th December for a renewal of the motion—and it finally came before my brother Middleton, who ordered the council to pay the amount. One branch of the appeal is from this order.

After the Court of Appeal had, on the 29th September, disposed of the appeal in the *Henderson* case from the Divisional Court, two members of the school board, on the 6th October, 1911, attended a meeting of the council, and “requested the council to pass a debenture by-law for the purpose of raising \$7,000 required by the school board for the purpose of the school building and property,” but were told by the Reeve that they “had no official notice of the decision of the Court of Appeal on the motion to quash the debenture by-law passed previously, and that they would have to consider the matter for thirty days.” It does not anywhere appear that these two had been appointed by the school board, that they represented or purported to represent the school board, or that the school board had in fact determined to press for the \$7,000. So, too, at the meeting of the council on the 29th November, 1911, one Wentworth McGuffin attended the council, and “requested them on behalf of the West Nissouri Continuation School Board to pay to the treasurer of the school board the sum of \$1,000 for the maintenance of the school, and the sum of \$7,000, or the proceeds of the debentures to be issued to build the school house, but I was told by the Reeve and other councillors that we had no by-law, and by one of the councillors . . . that the matter would have to be laid over

for consideration. . . ." No resolution or official or other act of the school board is adduced to shew any authority in McGuffin, even if he be the same McGuffin who in the previous June describes himself as a member of the West Nissouri Continuation School Board. Nothing was done by the council, and, on the 6th December, 1911, a notice of motion was served for a mandamus "directing the Corporation of the Township of West Nissouri . . . and the Reeve and councillors . . . to raise the sum of \$7,000 by the issue of debentures in the manner provided by the Municipal Act, 1903, and to pay the same to the treasurer of the West Nissouri Continuation School or to issue the debentures provided for under by-law 248 . . . and to pay the proceeds . . . to the treasurer of the West Nissouri Continuation School Board, or for such further or other order as may be just."

This motion came on along with the other before my brother Middleton, and he made an order as asked. And an appeal is also taken from this order

As to the first appeal, the formal order provides that the township do forthwith pay to the treasurer of the board the sum of \$1,000, as required by the board, for maintenance of the school, in pursuance of 9 Edw. VII. chs. 90 and 91.

I can see no ground for interfering with this disposition of the matter. The statute is plain—9 Edw. VII. ch. 91, sec. 37: the demand was official and sufficient; and, while the council may well have been justified in neglecting to comply with the demand until the Court of last resort had given its decision, there was no excuse after this decision. There may, indeed, have been no official refusal—no specific refusal in words; but "it is not necessary that there should have been a refusal in so many words." Little-dale, J., in *Rex v. Brecknock, etc., Canal Co.* (1835), 3 A. & E. 217, at p. 223. "All that is necessary in order that a mandamus may issue is to satisfy the Court that the party complained of has distinctly determined not to do what is demanded." Halsbury's Laws of England, vol. 10, p. 101, sec. 199. "There should be enough to shew that the party withholds compliance, and distinctly determines not to do what is required:" *per* Lord Denman, C.J., in *Rex v. Brecknock, etc., Canal Co.*, 3 A. & E. 217, at pp. 222, 223. See also *Rex v. Ford* (1835), 2 A. & E. 588.

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"No rule can be laid down for determining whether there has been a refusal or not. It is a waste of time to cite former decisions on the subject, as if the want of some one circumstance which existed in a former case would decide this:" Lord Denman, C.J., in *Regina v. Conservators of Thames* (1839), 8 A. & E. 901, 904.

I think it must be abundantly manifest from all the circumstances that the council "had distinctly determined not to do what is demanded." And, although the township seems to have no money, there need be no difficulty in procuring enough for this purpose.

This appeal must be dismissed.

As to the other appeal, there are different considerations. Our law does not, like the law in some at least of the American States, make a distinction between duties of a private nature and those which affect the public at large. In the law of these States, while in the former class of cases a demand and refusal are a condition precedent to relief by mandamus, in the latter the law itself stands in lieu of the demand, and the omission to perform the required duty in place of a refusal: Shortt on Informations, etc., p. 249; High on Extraordinary Remedies, pp. 17, 18. But, in our law, where the extraordinary remedy by mandamus is sought, the applicant must be *rectus in curia*—he must have made a demand and received a refusal.

I do not think that there was any request by the school board shewn—two individual members of the board did indeed demand, but not on behalf of the board—while McGuffin, the farmer who asked on the 29th November, 1911, does not adduce or pretend to any authority from the school board. It was the school board which was interested in the application; and I do not think the kind of demand made is sufficient. A formal demand would, in all probability, have been of no use; but, in proceedings such as these, the demand seems to be necessary.

While I agree that it was the duty of the council to provide the \$7,000, I do not think mandamus lies. But, while the appeal should be allowed, the dismissal of the motion for mandamus will be without prejudice to another application, after formal demand, so as to avoid the very stringent rule laid down in *Regina v. Mayor, etc., of Bodmin*, [1892] 2 Q.B. 21.

Counsel for the township said at the hearing that, if a proper

demand were made, the township would accede to the demand—so that it may be that another application will be unnecessary.

As the appeal succeeds in part, I think there should be no costs of the appeal; but that, in the proceedings below, costs should follow the event in each case.

FALCONBRIDGE, C.J.:—I agree.

BRITTON, J.:—I agree that the appeal in regard to the application for a mandamus as to the \$7,000 should be allowed, and that the appeal as to the \$1,000 should be dismissed. There should be no costs of these appeals to either party. The Township of West Nissouri should get costs in the proceedings below for the mandamus as to the \$7,000, and the Trustees of the West Nissouri Continuation School should get costs in the proceedings below for a mandamus as to the \$1,000.

This case differs materially in the facts from *Re Medora School Section No. 4* (1911), reported 23 O.L.R. 523.

I adhere to the dissenting opinion expressed by me in that case as to the exercise of judicial discretion in granting a mandamus as between school and municipal corporations.

*Order below varied.*

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[DIVISIONAL COURT.]

DOMINION FLOUR MILLS CO. v. MORRIS.

*Trade Mark—"Gold Medal"—Undescriptive Words—Secondary Meaning—Unregistered Mark—Passing-off Goods—Action to Restrain—Onus—Right of Plaintiffs to Use of Words—Misrepresentation.*

In an action to restrain the defendants from passing off their flour as the plaintiffs' by the sale of it in bags impressed with the unregistered trade mark "Gold Medal," which had been used by the plaintiffs for many years:—

*Held*, assuming the plaintiffs' right to use the words "Gold Medal," that they had not satisfied the onus which was upon them of shewing that the defendants had sought to palm off their flour as the flour of the plaintiffs, and of shewing that the words had acquired a technical and super-induced meaning distinct from the natural one and applicable only to the particular flour sold by the plaintiffs.

*Cellular Clothing Co. v. Maxton & Murray*, [1899] A.C. 326, specially referred to.

*Semble*, that, if there was no foundation in fact for the use by the plaintiffs of the words "Gold Medal," such as that they had gained a prize for their flour at some exhibition or competition, the plaintiffs would be outlawed for misrepresentation.

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APPEAL by the plaintiffs from the judgment of FALCONBRIDGE' C.J.K.B., dismissing the action, which was brought to restrain the defendants from selling flour in bags with the mark "Gold Medal" thereon, which, the plaintiffs alleged, was a mark used by them for many years as applied to the flour sold by them and by which it was known.

February 8. The appeal was heard by a Divisional Court composed of BOYD, C., LATCHFORD and MIDDLETON, JJ.

W. S. McBrayne, for the plaintiffs. The plaintiffs' business has been built up around the name "Gold Medal," in Hamilton and the vicinity, ever since the year 1886, in which it was used by their predecessors in title. The plaintiffs' flour has been asked for as "Gold Medal Flour" in the district mentioned during the last twenty-five years, and the name should be recognised as a mark applied to their flour by which it is known, and with which the defendants have no right to interfere. He referred to *Borthwick v. The Evening Post* (1888), 37 Ch.D. 449, *per* Cotton, L.J., at p. 461, and *per* Bowen, L.J., at p. 464, where these learned Judges clearly indicate that in such a case as that now before the Court, the plaintiffs should succeed, as here there is direct competition between the article supplied by the plaintiffs and that supplied by the defendants. Reference was also made to the following cases: *Lee v. Haley* (1869), L.R. 5 Ch. 155; *North Cheshire and Manchester Brewery Co. v. Manchester Brewery Co.*, [1899] A. C. 83; *Robinson v. Bogle* (1889), 18 O.R. 387; *Wheeler v. Johnston* (1879), L.R. 3 Ir. 284; *Crawford v. Shuttock* (1867), 13 Gr. 149; *Edelsten v. Edelsten* (1863), 1 DeG. J. & S. 185; *Burgess v. Burgess* (1853), 3 DeG. M. & G. 896.

G. Lynch-Staunton, K.C., and W. M. McClemon, for the defendants, referred to the following authorities: *Lee v. Haley*, *supra*, at p. 162; *National Starch Manufacturing Co. v. Munn's Patent Maizena and Starch Co.*, [1894] A.C. 275; *Robinson v. Bogle*, *supra*; *Partlo v. Todd* (1888), 17 S.C.R. 196; *Wheeler v. Johnston*, *supra*.

February 17. The judgment of the Court was delivered by BOYD, C.:—This is a case of alleged passing off goods by the sale of flour in bags impressed with a trade mark (unregistered) which, it is said, is used by the defendants to the plaintiffs' detriment.

The words used which are complained of are "Gold Medal;" and, as the mark is not registered, the onus is on the plaintiffs to shew that the defendants have been attempting to sell and have been selling the bags of flour they deal in as those made by the plaintiffs. The plaintiffs are millers, and manufacture this brand of flour at Hamilton; the defendants are dealers in flour, wholesale and retail, and sell flour manufactured at Caledonia in bags stamped with the same words as are found on the plaintiffs' bags, *i.e.*, "Gold Medal."

And next the onus is on the plaintiffs to shew that the term "Gold Medal" has acquired, as used by the plaintiffs, a secondary meaning, denoting their flour only.

The words "Gold Medal" are ordinary words capable of a well-understood meaning, and are applicable to articles which have gained a prize at some exhibition or competition. They are in no way descriptive of flour, nor can they properly be used as a trade mark if they are misdescriptive and misleading, in this sense, that the flour of the plaintiffs never had the "Gold Medal" awarded to it.

But, apart from this aspect of the case, suppose a legitimate use of the words, it lies upon the plaintiffs to prove that these merely descriptive words (implying success at some exhibition) have acquired a technical and superinduced meaning distinct from the natural one and applicable only to this particular flour. That is the proposition to be established, and it must be so by convincing evidence. Whereas here it is in evidence that the words "Gold Medal" are applied to flour all over the country (although the only makers who have heretofore supplied Hamilton under that name appear to be the plaintiffs).

The reasons against allowing an exclusive expropriation (so to speak) of the words "Gold Medal" to a particular kind of flour are more cogent than in the case of simply descriptive words. As to the latter class of words, I quote from Lord Shand: "If a person employing a word or term of well-known signification and in ordinary use . . . is yet able to acquire the right to appropriate a word or term in ordinary use in the English language to describe his goods, and to shut others out from the use of this descriptive term, he would really acquire a right more valuable than either a patent or a trade-mark. . . . That being so,

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it appears to me that the utmost difficulty should be put in the way of any one who seeks to adopt and use exclusively as his own a merely descriptive term." *Cellular Clothing Co. v. Maxton & Murray*, [1899] A.C. 326, at pp. 339, 340.

The origin of these words "Gold Medal," in reference to flour, is not as clear as might be in the evidence, but the use did not originate with the plaintiffs or their predecessors. It came from the United States, and spread since 1880 over many parts of Ontario. The evidence would lead me to say that it came to be used as a synonym for excellence. It was first applied to flour from Ontario wheat; but afterwards, as the trade developed, it came to be applied to a mixture of Ontario and Manitoba wheat. It came to mean an excellent blended flour of these components. Any good miller would know how to make a good blend—say 40 parts of Manitoba to 60 parts of Ontario product. But there was no standard or settled rule; and, as made by the plaintiffs, there were from year to year variations depending on the season, the yield, and the price. Various grades of the Manitoba wheat were used by the plaintiffs and their predecessors, and all sold in bags stamped "Gold Medal;" and so all along in other parts of the Province the same blend was sold in bags having impressed the same words. In brief, the words were used as a vague euphemistic term, serviceable as a sort of catch-word with the public, but of no significance as meaning the flour made by the plaintiffs any more than that made all over the country (outside of Hamilton).

In passing off cases it is not essential that fraud should be proved in case it appears that there is an intention to sell one man's goods as and for another's. The language in *Lee v. Haley*, L.R. 5 Ch. 155, cited by the Chief Justice, appears to be open to some modification in this respect (see judgment of Lord Westbury in *Leather Cloth Co. v. American Leather Cloth Co.* (1863), 4 DeG. J. & S. 137, affirmed in the same case (1865), 11 H.L.C. 523). But it is a matter of almost controlling significance if there is an absence of direct evidence to shew that any one has been deceived. I would again quote from Lord Shand's judgment a significant sentence which he commends from the judgment of Lord Kyllachy: "I do not myself remember a case in which the use of a merely descriptive name has been interdicted as deceptive, unless in cir-



cumstances which truly involved fraud on the part of the user: [1899] A.C. at p. 341. In the case in hand there is no evidence that any one was deceived by the defendants' use of the words, nor that any confusion had arisen or was likely to arise by purchasers of flour. Barring the use of the words in common ("Gold Medal") everything else in the defendants' advertisements and labels and bags appealing to the eye is clearly and distinctively different from those used by the plaintiffs. The defendants have made no attempt to deceive the public, or, if they have so attempted, no attempt has been made to shew it in evidence. The plaintiffs' trade may be affected by the defendants' business, but not more so than will arise from fair and ordinary competition.

The whole situation is cleared by what is said as to the source of the paper bags which held the flour. These have been prepared at the Lincoln Mills Paper Company's mills, stamped with the brand "Gold Medal," as far back as 1885, before the plaintiffs' predecessors were in the field, and these bags were supplied indiscriminately throughout Ontario. The company had a stock block with these words on, and various people would buy the bags so stamped without any name of flour-maker on. It was considered a stock pattern when so turned out without any name beyond "Gold Medal" on. Then, if makers' names were to be put on, the company would arrange and differentiate the printing so that one would not interfere with another. Supplies of bags made up with makers' names were furnished in this way in earlier years to Lake & Bailey, under whom the plaintiffs claim, as well as to the defendants in later years. This method of supplying and obtaining paper and other bags stamped "Gold Medal" takes all the point out of the supposed attempt to interfere illicitly with the plaintiffs' trade. The plaintiffs' suit is a vain attempt to impose a tertiary meaning on "Gold Medal," importing the particular blend of the plaintiffs' flour sold at Hamilton, and so exclude all competitors selling mixed wheat flour from the benefits of Hamilton trade. It is impossible thus to insulate Hamilton by reason of a supposed local meaning attaching to the mark "Gold Medal," and thereby give the plaintiffs a monopoly in that place.

The slender evidence to support this fabric is exposed by what is said by Lord Davey in a case already quoted from. For instance, a dealer in Hamilton says that, before the defendants

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began to sell "Gold Medal," if he had been asked for that brand, he would have sold the plaintiffs' flour. Naturally so, for the obvious reason that the plaintiffs' "Gold Medal" was then the only flour under that name sold in Hamilton. Of such kind of evidence Lord Davey said: "Unless the gentlemen who give evidence of that kind know that there are other manufacturers making similar classes of goods, there is no subject of comparison:" [1899] A.C. at p. 346.

As to the right to use "Gold Medal" by the plaintiffs, it is matter for serious consideration. If these words connote the same idea as "Prize Medal," and if there is no foundation in fact for their use, the cases of *Batty v. Hill* (1863), 1 H. & M. 264, 270, and *Tallerman v. Dowsing Radiant Heat Co.*, [1900] 1 Ch. 1, 9, go far to shew that the plaintiffs would be outlawed for misrepresentation; but the matter may be left undisposed of on the present record. I have assumed everything in favour of the plaintiffs' title, going back to 1885.

The brief sum of the whole is, that the plaintiffs have signally failed to prove that the defendants have sought to palm off their flour as the flour of the plaintiffs; and the result is, that the judgment should be affirmed with costs.

After handing out this judgment, I have found the point which was left undecided by us, decided as to "Gold Medal" in a New York case: see *Taylor v. Gillies* (1874), 59 N.Y. 331.

*Appeal dismissed with costs.*

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[DIVISIONAL COURT.]

RE STURMER AND TOWN OF BEAVERTON.

*Costs—Power of Court to Mulct Real Litigant—Stranger to Record—Motion to Quash Municipal By-law—Judicature Act, sec. 119—Leave to Appeal to Court of Appeal—Refusal.*

The Court has power to award costs against the real litigant when he brings a cause or matter before the Court in the name of a man of straw, for the purpose of avoiding liability for costs.

This jurisdiction is not confined to ejectment; and was exercised in a case where two ratepayers had put forward a third, a man without means, though not without interest, as applicant in an unsuccessful proceeding to quash a municipal by-law.

Review of the authorities.

*The Queen v. Greene* (1843), 4 Q.B. 646, 12 L.J.N.S.Q.B. 239, specially referred to.

Apart from the law and practice before the Judicature Act, sec. 119 of that Act, as found in R.S.O. 1897, ch. 51, gives full power to determine by whom and to what extent costs are to be paid, and makes clear the jurisdiction of the Court to award costs against a stranger to the record in a proper case.

Order of *Boyd, C.*, ante 190, 192, affirmed by a Divisional Court; and leave to appeal to the Court of Appeal refused by *Moss, C.J.O.*

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RE *STURMER*  
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APPEAL by Alexander Hamilton from the order of *Boyd, C.*, ante 190, 192, requiring the appellant to pay certain costs, amounting to \$384, to the Corporation of the Town of Beaverton.

January 15. The appeal was heard by a Divisional Court composed of CLUTE, LATCHFORD, and MIDDLETON, JJ.

*G. Lynch-Staunton, K.C.*, for the appellant, Hamilton, argued that the case at bar was entirely different from the cases in ejectment which are cited in behalf of the respondent's contention, as the jurisdiction to award costs against a landlord in these cases has always been regarded as an exception to the general rule that the Court will not interfere to make a person who is not a party to the record pay the costs of the action, though he is the real party interested in the event of it: *Hayward v. Giffard* (1838), 4 M. & W. 194, a case which was followed in *Evans v. Rees* (1841), 11 L.J.N.S.Q.B. 11. See also *Thrustout d. Jones v. Shenton* (1829), 10 B. & C. 110, 112, and *Berkeley v. Dimery*, *ib.* 113 (n.) The distinction between ejectment cases and others is also referred to in *Hutchinson v. Greenwood* (1854), 4 E. & B. 324, which is cited in the judgment from which this appeal is taken. The language of Warrington, J., in *In re Appleton French & Scrafton Limited*, [1905] 1 Ch. 749, at p. 755, shews that cases of that kind cannot be treated as precedents in a case like this, which is similar to the *Hayward* case: see 51 R.R. 529, and cases there collected. It cannot be said that the plaintiff in this case was a "manufactured plaintiff," and there is no reason to believe that he would not have taken the proceedings in any case. The application of the respondents is quite different from one asking for security for costs, in respect of which the Court has most extensive powers.

*W. E. Raney, K.C.*, for the respondents. The line of authority relied on by the appellant is derived exclusively from common law, yet the opinion of the majority of the Court in *Hutchinson v. Greenwood* is against him, as also a line of equity cases: see

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*Corporation of Burford v. Lenthall* (1743), 2 Atk. 551; *Attorney-General v. Skinners Co.* (1837), C. P. Coop. (Prac.) 1, 7, cited by Boyd, C; *Anonymous* (1807), 14 Ves. 207; *Hearsey v. Pechell* (1839), 5 Bing. N.C. 466 (a common law case); *In re Partington* (1821), 6 Madd. 71; *Burke v. Lidwell* (1844), 1 Jo. & Lat. 703; *Mason v. Jeffrey* (1866), 2 Ch. Ch. 15, where *Burke v. Lidwell* is referred to; *Hathway v. Doig* (1881), 9 P.R. 91; *Andrews v. Barnes* (1888), 39 Ch.D. 133, *per* Fry, J., at p. 138, where he deals with the jurisdiction of courts of equity in relation to costs.

*Lynch-Staunton*, in reply, argued that the cases cited on behalf of the respondents were not applicable. Lord Campbell says, in his judgment in the *Hutchinson* case, that it is an exception to the general rule; so that case is really authority in our favour. He referred to *Fraser v. Malloch* (1896), 23 Rettie 619.

January 26. CLUTE, J.:—Appeal from the order of the Chancellor directing one Hamilton to pay certain costs amounting to \$384, the balance of costs in testing local option by-law.

It clearly appeared and was not disputed that the proceedings taken in the name of Sturmer were at the instance of Hamilton and one Overend. Sturmer being irresponsible, they put him forward in order to escape liability for costs; they became responsible to the solicitor who acted for Sturmer for his costs, and they furnished the money paid into Court as security for costs. The amount here ordered to be paid is the amount in excess of the security given.

The Chancellor held that the proceeding was an abuse of the process of the Court, and that there was inherent power in the Court to make the person who had set the Court in motion pay the costs of the unsuccessful application, and this though the person be not formally a party, but one who is the instigator and supporter of the movement. He further held that under the Judicature Act\* there is now ample jurisdiction to deal with costs; full power is given to determine by whom and to what extent costs are to be paid: sec. 119.

Mr. Lynch-Staunton strongly urged that the rule here invoked was only applicable in cases of ejectment, because in those cases the tenant is put forward by the landlord as a party,

\*R.S.O. 1897, ch. 51.

and that the Court has no jurisdiction to bring any one not a party before the Court and order him to pay the costs, and that the Judicature Act has no application to the present case, and does not extend the rule to a case like the present.

He further pointed out that, in the present case, the applicant had a right to move, and that it was only in those cases where the applicant had no right that the rule applied.

The case chiefly relied upon by the appellant was *Hayward v. Giffard*, 4 M. & W. 194. The affidavits upon which the rule in the *Hayward* case was obtained, calling upon one Spencer to pay the defendants their costs, tended to shew that Spencer was the real plaintiff, and not Hayward, and also set forth an admission by the plaintiff's attorney "that the action was brought by and at the instance of the said George Spencer, and that the said Hayward was the nominal plaintiff only." Lord Abinger stated that, were they at liberty to consult equity and justice, they should probably make the rule absolute. He further pointed out that the authority of the Courts at Westminster is derived from the Queen's writ, directing them to take cognisance of the suits mentioned in the writs respectively, and thus bringing the parties before them. This being so, they had no power to order any particular individual to come before them at their pleasure. In the absence of contempt or other special cause, "we cannot make any order against an individual who is not party to any suit before us, nor has been guilty of any contempt, but merely because he has an interest in the event of the suit." He then points out the exceptional cases where the Courts have interfered in this way, referring to ejectment, which is a fictitious proceeding, and the Courts allow the action to be brought in the name of a nominal plaintiff, and allow the landlord to come in and defend, but they take notice of the real parties litigant. "Those are the excepted cases, but the general rule is, that courts of justice have no power except over parties to the record."

This case was followed in *Evans v. Rees* (1841), 2 Q.B. 334 11 L.J.N.S.Q.B. 11, and cited in the judgment of the Judicial Committee in *Ram Coomar Coondoo v. Chunder Canto Mookerjee* (1876), 2 App. Cas. 186. Sir Montague Smith, who delivered the judgment of the Committee, referred (p. 212) to the Courts having ordered the real parties to pay the costs in actions of ejectment,

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originally on the ground that that action was in form a fictitious proceeding, and having once assumed this power they had continued to exercise it in the actions substituted for that of ejectment. "Again, the Courts, it has been said, would so interfere in case of any contempt or abuse of their proceedings: see *Hayward v. Giffard*." The case was also referred to in the judgment in the Scottish case *Fraser v. Malloch*, 23 Rettie 619.

In *Hutchinson v. Greenwood*, 4 E. & B. 324, it was held that in ejectment, as well since the Common Law Procedure Act, 1852, as before, the Court has jurisdiction to order by rule the parties really conducting the defence to pay the costs of the plaintiff, though those parties are strangers to the record, and claim no interest in the property. Lord Campbell in this case says, at p. 326: "I cannot see that the Common Law Procedure Act, 1852, affects the question at all. The principle is that the individuals who order an appearance to be entered in ejectment, in the names of those not really defending the suit, abuse our process, and that, as they substantially are the suitors, we have jurisdiction to make them pay the costs." Erle, J., dissenting, was of opinion that, the parties being strangers to the record, the Court had not this summary jurisdiction over them.

In *Evans v. Rees*, 11 L.J.N.S.Q.B. 11, Wightman, J., referring to *Hayward v. Giffard*, states that all the cases cited in which this power has been exercised were ejectments; and that form of action is an exception to the general rule.

A case more nearly resembling the present is that of *The Queen v. Greene* (1843), 4 Q.B. 646; *S.C.* (1842), 11 L.J.N.S.Q.B. 281. There it was held that where a rule *nisi* for a *quo warranto* information is discharged, and it appears that the party making affidavit as relator is indigent and unable to pay costs, and was procured to make the application by another who is the real prosecutor, the Court will order the costs to be paid by the party so promoting the application. It makes no difference that such party was employed on the motion as an attorney. In this case *Hayward v. Giffard* was cited. It is true that the person ordered to pay the costs was a solicitor, but that was not the ground for the order for payment. Lord Denman, C.J. (4 Q.B. at p. 652), said: "The question is, whether a person who, on a motion for a *quo warranto* information, acts as an attorney, is on that account to avoid pay-

ment of costs, when he has, in fact, been the relator, but has put forward another person in that capacity, who is unable to pay costs. I have no doubt that he is liable, where it appears that he is actually and virtually a relator."

In *Hearsey v. Pechell*, 5 Bing. N.C. 466, Tindal, C.J., said: "The real question is, whether this is the action of the plaintiff, or substantially the action of Mr. Wood. If it were an action which the plaintiff would not have brought but for the instigation and countenance of Wood, the case would fall within *Tenant v. Brown* (1826), 5 B. & C. 208, and another case in the Court of King's Bench, where a master was compelled to pay costs for his servant, whom he had put forward as a defendant instead of himself. But it is not clear to me that this is an action which the plaintiff would not have brought without instigation of Wood."

In (1843) 12 L.J.N.S. Q.B. 239, the case of *The Queen v. Greene* came before the Court, consisting of Denman, C.J., Patteson, J., Williams, J., and Wightman, J., on a subsequent application,\* when Lord Denman said: "I am of opinion, upon the facts of this case, that a person in the situation of the attorney here, is not to avoid the payment of costs, when he is, in fact, the real relator, merely by putting forward another person, bearing that name, and who has complied with the general rule of Michaelmas term, 1839. Under such circumstances, the real party will be made to pay the costs."

I do not find that *The Queen v. Greene* has ever been overruled or questioned. It is, I think, an authority in an application of this kind to give costs against the party who is the real litigant, although his name does not appear as the applicant making the motion.

I agree with the Chancellor that, under the Judicature Act, there is now ample jurisdiction to deal with costs, full power being given to determine by whom and to what extent costs are to be paid: sec. 119; and in a case of this kind I am of opinion that, where the real party litigant puts forward another person in whose name proceedings are taken, the Court has jurisdiction to impose costs against the real litigant. The appeal should be dismissed with costs.

\*The application appears to have been subsequent to that reported in 11 L.J.N.S.Q.B. 281; but the same application as that reported in 4 Q.B. 646, from which report the learned Judge quotes above.

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LATCHFORD, J.:—I agree.

MIDDLETON, J.:—I think the judgment appealed from is clearly right. It is quite true that the jurisdiction of the Common Law Courts to award costs must, in general, be found in some statute; but it is equally a recognised exception to this general statement that the Common Law Courts always had power to award costs against one unsuccessfully invoking the aid of its process, even when the Court had no jurisdiction to entertain the application: *Rex v. Bennett* (1902), 4 O.L.R. 205; *Re Cosmopolitan Life Association* (1893), 15 P.R. 185; *In re Bombay Civil Fund Act* (1888), 40 Ch.D. 288. And the Court always had power to award costs against the real applicant when the motion was made by him in the name of a man of straw for the purpose of avoiding liability. The Courts were never so blind as to be unable to see through the flimsy device nor so impotent as to be unable to act.

*The Queen v. Greene*, 4 Q.B. 646, has never been doubted. It determines: "Where a rule nisi for a *quo warranto* information is discharged, and it appears that the party making affidavit as relator is indigent and unable to pay costs, and was procured to make the application by another who is the real prosecutor, the Court will order the costs to be paid by the party so promoting the application." This is a decision of Denman, C.J., and Patterson, Williams, and Wightman, JJ. In answer to the rule *Regina v. Thomas* (1837), 7 A. & E. 608, *Hayward v. Giffard*, 4 M. & W. 194, and *Regina v. Dodson* (1839), 9 A. & E. 704, were relied upon—and, in addition, it was urged that Simpson, to whom the rule had been addressed, was attorney for the relator, and was acting in discharge of his duty. Lord Denman says: "The question is, whether a person who, on a motion for a *quo warranto* information, acts as an attorney, is on that account to avoid payment of costs, when he has, in fact, been the relator, but has put forward another person in that capacity, who is unable to pay costs. I have no doubt that he is liable, where it appears that he is actually and virtually a relator." This justifies the head-note, which proceeds: "It makes no difference that such party was employed on the motion as an attorney." In other words, the liability is not because he was attorney, but notwithstanding that he was attorney.

This case also shews that the liability may be enforced in a summary way.



Some question having arisen as to the material that should be read upon such an application, a rule of Court was promulgated in Easter term, 1843, dealing with this question: "In every case in which the Court shall grant a rule . . . to compel any person, not a party to an original rule, to pay the costs of such original rule," &c. Thus, in the year 1843, the Common Law Courts, not only by decision, but by formal rule, asserted the jurisdiction in question.

It is said with much force that the cases shew that the jurisdiction to award costs against a landlord who defended an ejectment action was always regarded as an exception to the general rule that the Court had no power save over parties to the record, and that this exception was based upon the peculiar practice in ejectment. Undoubtedly this is said in so many words in *Hayward v. Giffard*, 4 M. & W. 194, but I can only regard *The Queen v. Greene* as a deliberate refusal to recognise this limitation to the general power of the Court.

In *Mobbs v. Vandenbrande* (1864), 33 L.J.Q.B. 177, a motion was made in an ejectment action to compel one Johnson, who had really brought the action in the name of Mobbs, to pay the defendant's costs. The motion was resisted upon the ground that the only exception to the general rule was in the case of defences in ejectment, and it was shewn that the Court had assumed jurisdiction over the landlord who defended in his tenant's name because he was a party to the consent rule necessary under the old practice. This made the landlord *quasi* a party and conferred jurisdiction over him. It was said that Johnson, not being a party to any such consent rule, could not be made liable. Cockburn, C.J., says: "I certainly agree with Mr. Prideaux, that the origin of the equitable jurisdiction as to costs, exercised by the Courts in the action of ejectment as distinguished from other actions, arose from the circumstance that persons, otherwise not parties on the record, were brought before the Court by being compelled to enter into the consent rule. And being thus within the jurisdiction of the Court, the Court could deal with them as to costs according to the equities of the case. But whether that be the origin of the jurisdiction or not, it has certainly been extended in practice beyond persons who have become parties to the consent rule. I think it a most useful and salutary jurisdiction, and one

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that we ought to exercise whenever the merits of the case require it. . . . It has been established by the dicta of learned Judges in one or two cases, that, irrespective of being parties to the consent rule, where it is found that there is a real defendant or plaintiff behind, the Court will compel such person to pay costs." *The Queen v. Greene, supra*, was not cited, and the only cases considered seem to have been ejectment cases. Blackburn, J., after stating that the Court had jurisdiction by reason of the consent rule, adds: "But if the real parties had not entered into the consent rule, the Court had yet jurisdiction over them, on the ground, I suppose, that there had been an abuse of the process, or perhaps because the whole proceeding was the creation of the Court."

The fictitious character of the old action of ejectment was made obsolete by the Act of 1852, and in this case as well as in *Hutchinson v. Greenwood*, 24 L.J.Q.B. 2, it was contended that the action, by the Common Law Procedure Act, having ceased to have the peculiar character of the fictitious action devised by Chief Justice Rolle, this peculiar remedy was at an end. Lord Campbell, C.J. (24 L.J.Q.B. at p. 4), after stating that he had always regarded ejectment as an exception, in the end bases his judgment upon the general and wider right: "I do not think that the practice is contrary to general principle, because those who come into Court in another name and abuse the process of the Court, justly render themselves liable to pay costs as suitors. . . . With sincere respect for my brother Erle, who still, I believe, entertains a different opinion, I cannot entertain any doubt as to our jurisdiction to grant the present rule; and as it is not disputed here that the parties against whom the rule is sought to be made absolute are the persons who really caused the appearance to be entered and have defended the action by their own attorney, and though not the nominal, are really the substantial defendants against whom the plaintiffs have recovered a verdict, I think they are liable to pay the costs." Wightman, J., places the case upon the same broad general grounds: "According to the old rule of practice, recognised . . . by the authority of several cases, and founded upon very good reasons, a party who chooses to defend an action in the name of another, and for whose benefit the defence is really carried on, and who may in effect be considered as the real though not the nominal defendant, may be

called upon by the plaintiff to pay the costs of the action." Erle, J., bases his dissenting judgment upon the precise ground relied upon by the appellant, that to order payment of costs by one who is not a party to the record is contrary to principle. Singularly, *The Queen v. Greene* is not referred to in any way.

There is a dictum of Tindal, C.J., in *Hearsey v. Pechell*, 8 L.J.N.S.C.P. 247,\* much in point: "Where a party, for the purpose of trying a right, put forward his servant to exercise and act upon such assumed right, and consequently he, the servant, became the only defendant in an action of trespass, and the real principal stood by and gave assistance by means of his attorney; when, afterwards, the question of costs came to be decided, and the Court perceived that the party endeavoured to screen himself from the payment, by putting forward his servant as a nominal defendant, they compelled him to pay the costs." In one of the contemporary reports, the learned Chief Justice refers to this as "a case decided by the Queen's Bench."

The case of *Hayward v. Giffard* contains in the judgment of Lord Abinger (4 M. & W. at p. 196) an expression not without significance: "In the present case, if it could have been shewn that Spencer had committed any contempt of Court, or been guilty, in respect of this suit, of anything in the nature of barratry or maintenance, it would have been another matter; but we cannot make any order against an individual who is not a party to any suit before us, nor has been guilty of any contempt, but merely because he has an interest in the event of the suit."

In this case it is not said that Hamilton "merely has an interest in the suit." It is said and shewn that it is his suit and that he has been guilty of something in the nature of barratry and maintenance, because, desiring to try his own right, he has procured this man of straw to allow the litigation to be brought in his name. This, as the cases shew, is an abuse of the process of the Court, and I think a contempt of a most serious character, because the Court, which is called into existence to administer justice, is being used as a tool and instrument by which an injury is inflicted, which, it is said, it can in no way redress.

In Chancery, there never was any such limitation suggested as

\*This is the case cited in the argument and by Clute, J., as reported in 5 Bing. N.C. 466.

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to the power of the Court over costs. The books contain many references as to the mode in which payment of costs may be enforced against persons not parties to the suit (*e.g.*, *Sangar v. Gardiner* (1838), C.P. Coop. (Prac.) 262, *Attorney-General v. Skinners Co.*, *ib.* 1); but singularly do not contain, so far as I can ascertain, any case in which the foundation of that jurisdiction or the principles by which the discretion of the Court was governed, are discussed.

Courts of Equity, it is said, have in all cases awarded costs "not from any authority but from conscience and *arbitrio boni viri*:" *Corporation of Burford v. Lenthall*, 2 Atk. 551. See also *Andrews v. Barnes*, 39 Ch.D. 133.

But, quite apart from any consideration of the law and practice before the Judicature Act as now amended, I think that that Act makes our jurisdiction clear. In addition to the power originally conferred, which made all costs "in the discretion of the Court," the Court now has "full power to determine by whom and to what extent such costs are to be paid." These words were added to get rid of the restricted meaning attached to the words of the earlier Act in *In re Mills Estate* (1886), 34 Ch.D. 24, and the Court has, since then, declined to apply any narrow construction to the amending Act: *In re Fisher*, [1894] 1 Ch. 450; *In re Schmarr*, [1902] 1 Ch. 326; *Dartford Brewery Co. v. Moseley*, [1906] 1 K.B. 462. *In re Appleton French & Scrafton Limited*, [1905] 1 Ch. 749, is an instance in which the Court held that this statute enabled costs to be awarded to one not a party to the record.

The power conferred by this statute is one which must be exercised upon principle, and in accordance with those rules that govern the exercise of all judicial discretion, and in no harsh and arbitrary manner; but where, even in the old cases, it is said that justice and equity point to the propriety of an order in such cases as this, and the Court laments the absence of jurisdiction, there can be no reason, now that jurisdiction is conferred by the Act, why the Court should be slow to exercise it in proper cases.

One is inclined to wonder at the timidity of some of the earlier Judges and to admire the robust sense and courage of Lord St. Leonards, who in a somewhat similar case (*Burke v. Lidwell*, 1 Jo. & Lat. 703), after commenting upon the highly improper conduct of those who induced the pauper plaintiff "to allow his

name to be made use of as the plaintiff in this suit, for the fraudulent purpose of avoiding the payment of costs," said (p. 708): "Can there be a fraud which this Court ought to visit more strongly than the conduct pursued in this case, in which, in order to avoid the payment of the costs of a doubtful litigation, to which the plaintiff might be made liable, the real plaintiff procures a pauper to become the nominal plaintiff . . .?" What was there sought was security for costs, and it was argued that there was no power in the Court of Chancery to make such an order and no precedent for it, though that remedy was well known at law. "Then comes the question, have I power to act in accordance with my opinion? . . . It would be a reflection upon the administration of justice if I had not such a power. I am clearly of opinion that I have that power, and I am prepared to exercise it, and to make a precedent if none exist." Can it be doubted that Lord St. Leonards would have made the order now asked?

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*Appeal dismissed with costs.*

Alexander Hamilton then moved for leave to appeal to the Court of Appeal from the order of the Divisional Court.

February 1. The motion was heard by Moss, C.J.O., in Chambers.

*F. Morison*, for the applicant.

*W. E. Raney*, K.C., for the respondents.

February 17. Moss, C.J.O.:—The actual amount involved in the proposed appeal is \$384, which is said to be the excess of the taxed costs of opposing the original application beyond \$300 paid into Court as security.

The special grounds urged in support of a further appeal are, that Hamilton not having been a party to the original proceedings, the Court had no jurisdiction to compel him to pay any of the costs incurred in the matter, and that, neither by the practice as it existed before the Judicature Act, nor by virtue of the power as to costs conferred by that Act, have the Courts power or jurisdiction to make such an order, even admitting, as it is admitted here, that the proceedings were instigated by Hamilton and were prosecuted on his behalf and for his benefit.

These points were urged before and fully considered by the

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Courts below. It is not necessary to express or form an opinion at present as to the effect, if any, of the provisions of the Judicature Act and the Consolidated Rules in the matter of enlarging the powers and jurisdiction of the Court as regards directing payment of costs by persons not parties to the original proceeding, though it may well be that such is the case. The decision now sought to be appealed from does not appear to introduce a novel rule of practice—one hitherto unconsidered and now acted upon for the first time by the Courts. While apparent conflict between some of the early and the later decisions may be pointed at, it is plain that objections founded on technical reasons are no longer permitted to prevent the Court from dealing, so far as costs are concerned, with one who has so intervened as to make himself the substantial though not the ostensible party.

The decision in question here does not appear to carry the rule beyond what appears to be well-established by decisions under somewhat similar circumstances.

No special reason appears for permitting the applicant to carry further a question of this kind, especially where the amount involved is so far under the statutory sum. It would not be proper to grant leave to appeal on the mere question whether, assuming it to possess jurisdiction, the Court properly exercised its discretion in the circumstances of this case, even if that point appeared more doubtful than at present it seems to me to be.

The motion must be refused with costs.

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[DIVISIONAL COURT.]

HOOEY v. TRIPP.

*Deed—Construction — Conveyance of Half of Irregularly Shaped Lot — Ascertainment of Division Line—Equality — Area — Frontage — Value—Surveys Act.*

The owner of a town lot, forming part of a triangular-shaped piece of land, sold the west half of the lot to the defendant in 1909, and the east half to the plaintiff in 1911. The lot was bounded on the south by D. street, the principal street of the town; it was not a parallelogram, but had a considerable slice taken off its north-east end by the diagonal trend of another street. The description in the conveyance to the defendant was, "the west half of lot 8 on the north side of D. street . . . reserving the right to build on all the remaining part of the lot . . . according to E. and B.'s registered plan." In the conveyance to the plaintiff the description was, "the east half of lot 8 on the north side of D. street . . . according to" the same plan. There was a dispute as to the right line of division between the two half lots:—

*Held* (MIDDLETON, J., dissenting), that the equality which the two deeds contemplated would be best preserved by giving, as far as possible, an

equal division, as to area, as to the main and controlling frontage, and as to comparative advantages; and this should be accomplished by running the dividing line, beginning from D. street, parallel with the side lines as far as they were parallel, and bisecting the lot so far in equal parts; and then, when this dividing line reached the point opposite where the diagonal side of the lot lying to the east began, by deflecting the line and making it trend west from the centre of the lot to the northern boundary so as to give an equal area of land in that part of the lot to each half owner.

*Skull v. Glenister* (1864), 16 C.B.N.S. 81, and *Herrick v. Sibby* (1867), L.R. 1 P.C. 436, followed.

The Ontario Surveys Act, R.S.O. 1897, ch. 181 (now 1 Geo. V. ch. 42) has no application to the situation.

*Per MIDDLETON, J.*:—A conveyance of a particular aliquot portion of a lot is a conveyance of an aliquot portion of the total area of the lot, quite irrespective of any question as to the value of the different parts of the lot. The purchaser of the west half acquired the west half of the total area. The deed, being free from ambiguity, must be interpreted by the words used.

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AN appeal by the defendant from the judgment of the County Court of the County of Hastings, in favour of the plaintiff, in an action for trespass to land. By the judgment, the plaintiff was awarded a mandatory injunction requiring the defendant to move the fence erected by her as the division line between her half-lot and the plaintiff's, \$25 damages, and the costs of the action.

February 8. The appeal was heard by a Divisional Court composed of BOYD, C., LATCHFORD and MIDDLETON, JJ.

*E. G. Porter*, K.C., for the defendant. The conveyance to the defendant entitled her to the west half of lot 8 as laid out on Dundas street, according to Evans and Bolger's plan of Trenton, and the eastern boundary of that half lot should be a line drawn from the centre of the Dundas street boundary of the lot at right angles therewith and parallel to the western boundary of the lot to the rear thereof. The learned trial Judge was in error in dividing the lot into equal halves according to the superficial feet in the whole of the lot: *Smith v. Millions* (1889), 16 A.R. 140. The plan shews only the frontage.

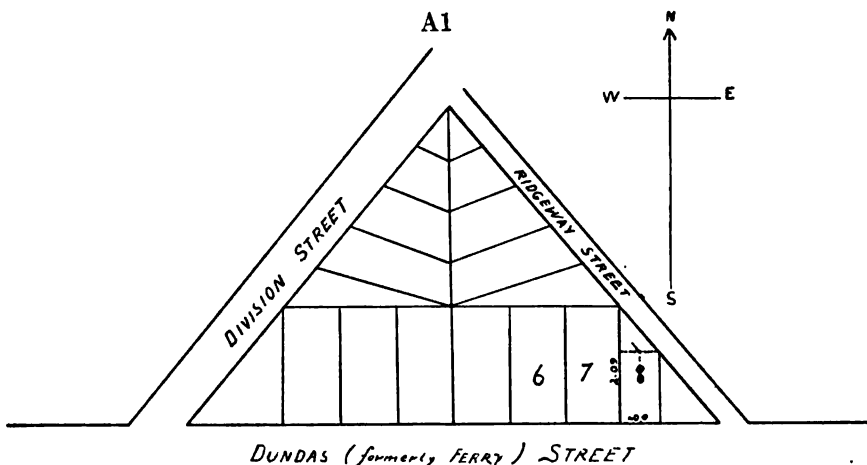
*W. C. Mikel*, K.C., for the plaintiff. A "half" of a lot means, in a deed, a half in quantity; not a third, or any other part. Each party should have half the superficial area. See the Surveys Act, R.S.O. 1897 ch. 181, sec. 19, which was the Act in force then. To divide by frontage would not be fair. The authorities are clear as to what is the meaning of a half lot. See *Scryver v. Young* (1909), 14 O.W.R. 530; *Cogan v. Cook* (1875), 22 Minn. 137; *Dart v. Barbour* (1875), 32 Mich. 267; *Au Gres Boom Co. v. Whitney* (1872), 26 Mich. 42. The case of *Smith*

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v. *Millions*, relied on by the defendant, does not apply in the way that counsel would have it. There the line to be established was between two lots, while here the line in question is between two halves of the same lot.

*Porter*, in reply. The cases cited on behalf of the plaintiff, I submit, have no application, as in all of them the land was not sold according to plan. The plan here shews only the frontage measurement. The deed refers to the registered plan; and, therefore, the registered plan becomes part of the description.

February 20. BORD, C.:—The lot in question formed part of a triangular-shaped piece of land bounded on the south by the principal street of Trenton (Dundas, formerly Ferry street), by Division street, sloping west and north, and by a narrow and comparatively unimportant street, sloping east and north, and meeting Division street at the apex of the triangle. One row of lots faces south on Dundas street, a chain in width and about two chains deep, except two triangular lots at each end of this front row, and the lot in question, No. 8, which is not a parallelogram, but has a considerable slice taken off its north-east end by the diagonal trend of Ridgeway street. A diagram (A1) will best illustrate the peculiarities of the situation.



Sheriff Proctor owned lot 8, and sold the west half of the lot to Tripp in 1909, and afterwards the east half to Hooley in 1911. The whole dispute is as to the right line of division between these two half-lots.



Once there was a building facing on the street, but it has been burned down, and the whole lot is now vacant land.

The material words of description are "the west half of lot 8 on the north side of Dundas street (formerly Ferry)—reserving the right to build upon all the remaining part of the lot . . . according to Evans and Bolger's registered plan."

The other is described as the east half of lot 8 on the north side of Dundas street . . . according to the plan mentioned.

A fence was put up by Tripp about the centre of the whole lot, running parallel with the side line to the west between 7 and 8, which would give 462 feet of total area more to Tripp than to Hooley.

The County Court Judge has given effect to a line drawn by a surveyor for the plaintiff, running approximately north and south and parallel with the side line to the west of lot 8 and at right angles with Dundas street, which gives an equal area to each half lot, but on the front gives 56 links to the defendant and only 44 links to the plaintiff.

Both parties, I think, err in their claim: Tripp, because his line midway through the lot would not give equal superficial areas to each half; and the plaintiff's (approved by the Judge), while it gives an equal area to each, is not a fair line of division, because it deprives the defendant of some seven feet of the front on Dundas street, which is the important boundary line, by its denomination in the deed, its position, and its value for the practical use of the property as a whole.

There is no reason in law or in fact why, in a lot shaped like this, with a bias or diagonal line on one side, the line of division to separate it into half lots should be run parallel to the side line, which is straight; it may be run partly straight and partly to accommodate itself to the bias or diagonal line formed by the street at the north-east side of lot 8.

As far as the side lines of lot 8, beginning from Dundas street, are parallel, I would run the dividing line between the two half lots parallel thereto, and bisecting lot 8 so far in equal parts; and then, when this dividing line has reached the point opposite where the diagonal side of lot 8 lying to the east begins, I would deflect the line of division for the two half lots by a right line

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trending west from the centre of the lot to the northern boundary so as to give an equal area of land in that part of the lot to each half owner (as partly marked in dotted lines on diagram).

This secures an equal division, both as to area, as to the main and controlling frontage, and as to comparative advantages—matters which one can regard, on the principle approved in *Skull v. Glenister* (1864), 16 C.B.N.S. 81, that the Court may consider all material facts existing at the time of the transaction so as better to appreciate what was being done. I think the equality which the two deeds contemplate is best preserved by giving, as far as possible, an equal division of the whole lot. That is to say, the width of the lot fronting on Dundas street is to be equally divided through the width of the whole lot, with the required result of giving each party an equal superficial area. The straight line parallel to both sides from the front on the south part of the lot, going about two-thirds of the whole length of the lot, and the deflected line starting where the parallel line of division ends, and going south for the other third part of the lot to the north, which has the diagonal slice taken off to the east, will also effect this equal division. This method of partition, by the employment of a middle line of division for two-thirds with a partial deflection for the other one-third length, is justified by the considerations taken into account by the Judges of the Privy Council in *Herrick v. Sizby* (1867), L.R. 1 P.C. 436, at p. 449.

The parcels to be ascertained are the east half and west half of lot 8, and these parcels must have an equal area; that is the prime requisite. Next is to be regarded equality in width in a lot situated as is this one. The equality contemplated by the deeds is best preserved by giving equality in these regards to the whole lot as far as possible. By the method now given, about two-thirds of the lot (being the southerly part fronting on Dundas street) will be divided with equal area and equal width to each party, and the remaining one-third to the north is divided into equal areas, but of unequal width. Both equalities cannot be obtained in the rear part; owing to the diagonal side of lot 8 and to the prime requirement as to equal areas, the other, as to equal width, must give way. *Herrick v. Sizby*, L.R. 1 P.C. 436, may be consulted as to the best way of grappling with difficulties caused by ambiguous boundaries of land.

The Ontario Surveys Act, R.S.O. 1897, ch. 181, does not apply to the manner of dividing a lot laid out on a private plan; and, if it did, it casts no light on the method of running a dividing line by which an aliquot part is to be ascertained.

. Both parties claiming erroneously, I think this case should be without costs throughout, including the appeal to this Court.

LATCHFORD, J.:—I have not the slightest doubt that when the defendant's husband obtained the conveyance of the 16th February, 1909, he intended to acquire the westerly thirty-three feet from front to rear of the lot in question. His letter to Sheriff Proctor is not in evidence; but the Sheriff's reply of the 9th February offers to sell "thirty-three feet off the west side of the lot" for \$1,200. The letter proceeds: "The east line, I think, would be about one hundred and thirty feet—the west line about one hundred and fifty feet. The north line, you are aware, is on the bias. I would expect to leave an alley of about twelve feet on the east side for public use and light for the building, which would practically have a thoroughfare on three streets. This lot is situate between the market, the Central Ontario Railway, and the post office, and (on) the main business thoroughfare. For the business you suggest there is no other place available in Trenton like it. You could have a first-class restaurant in the basement, with your shop above and alley in the rear. I will be pleased to hear from you in regard to you entertaining the idea."

From this it would appear that Tripp desired the property for business purposes, and that, as indicated by his commendation, Proctor was desirous of making a sale. Tripp died in 1910; and the only evidence regarding the conveyance made one week after the Sheriff's letter was written is but such as can properly be afforded by the conveyance itself. The Sheriff, who was examined at the trial, does not suggest that he sold to Tripp any property but that mentioned in the letter. The price is different—\$1,100 instead of the \$1,200 first asked. There is a significant reservation in the deed of a right to the grantor "to build on all the remaining part" of the lot. This was unnecessary as a matter of conveyancing. The deed was not, however, prepared by a solicitor, but, it would appear, by the Sheriff

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himself. The only possible, if not indeed the obvious, reason for the insertion of the reservation is, that the Sheriff felt that he might otherwise be bound by the offer in his letter to leave an alley along the east side of the property he had offered to sell to Tripp. The description in the letter was not followed in the deed, which purported to convey "the west half of lot number 8 on the north side of Dundas (formerly Ferry) street in the town of Trenton," as shewn on a certain plan, subject to the reservation mentioned.

The plaintiff, as a subsequent purchaser from Proctor of the east half of the same lot, had notice only of the conveyance to Tripp, and asserts that he is entitled to one-half in area of lot number 8. Owing to the shape of the lot—an irregular pentagon,—one-half its area, as divided in the judgment appealed from, would unequally divide the frontage, giving to the plaintiff thirty-six and a half feet (.56 chains) and to the plaintiff but twenty-nine and a half feet (.44 chains).

The learned trial Judge has based his decision on sec. 19 of the Surveys Act, R.S.O. 1897, ch. 181—now sec. 18 of 1 Geo. V. ch. 42. With deference, I think the Surveys Act has no application. Section 19, in the revision of 1897, is very wide in its language, but it must not be extended beyond the ambit of the Act. It is intimately and indeed expressly connected with secs. 17 and 18. All three sections are in fact included in a single section—35—of the first consolidation of the Ordinances and Statutes respecting Surveys—(1849) 12 Vict. ch. 35—and have reference only to boundary lines of concessions, sections, etc., and all side lines and limits of lots surveyed and all trees marked in lieu of posts and all posts and monuments marked, placed, or planted at the front or rear angles of any lots or parcels of land, under the authority of the executive for the time being. By sec. 18, in force when this transaction took place, "Every township . . . lot or parcel of land, shall embrace the whole width, contained between the front posts . . . so marked, placed or planted" under the authority of the Government." Section 19 has reference only to patents, grants, or instruments purporting to be for an aliquot part of any lot in any *such* township, city, town, etc., and does not apply to a lot in a subdivision of a part of a township, town, or parcel of land made at the

instance of a private owner. The only reported case in which sec. 19 (then sec. 68 of the C.S.C. 1859) was considered is *Babaun v. Lauson* (1868), 27 U.C.R. 399. But there the subdivision of a lot, as shewn on the original survey of a township, was before the Court. Section 19 of the Revised Statute has not, I am satisfied, nor has sec. 18 of the revision of 1911, any application to such a plan as is referred to in the deed from Proctor to the plaintiff's predecessor in title. The appeal has, in my opinion, to be considered without assistance from the Surveys Act.

The lot in question fronts on the main business street, and is in the principal business centre of the town of Trenton. In such locations in all our towns and cities, frontage is the most important factor of value. It may be that, according to the strict rules of evidence, a Judge is the only person presumed not to know a fact so notorious. However, in the exceptional circumstances of this case, I should be prepared—were it necessary to go so far—to disregard such rules rather than sanction by following them an act of injustice, if not of dishonesty. But I am not driven to that extremity. That both Tripp and the plaintiff bought from Sheriff Proctor with reference to the frontage, may be inferred from the deed and plan. Dundas street, as shewn upon the plan, does not run east and west. Its bearing is N. 44 degrees 25 E. mag., or N. 41 degrees 51 E. ast. To divide the lot into east and west halves of equal area by a line on the magnetic or astronomical meridian would be absurd. Yet only thus would one party have the *east* and the other the *west* half of the lot. One would have all the front, and the other none of it—a manifestly absurd situation. It would, therefore, appear that all parties gave to the east and west halves a conventional, as distinguished from a literal, meaning. I think effect can be given to the descriptions so interpreted, and at the same time to the cases which decide that half a particular lot means half the area of that lot.

This doubly desirable result may be attained by dividing the front by a centre line extending at right angles to Duncan street for 1.30 chains (or the depth of the north-east side of the lot), and thence continued westerly in such a location as will divide the remainder of the lot into two other equal areas.

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There should be judgment accordingly. Success, like the lot, being divided, there should be no costs of the appeal.

MIDDLETON, J. (dissenting):—The Surveys Act has no application to this case, nor, in my opinion, does it form any guide to the interpretation to be placed upon the description in the deed.

All the cases cited and many others agree in holding that a conveyance of a particular aliquot portion of a lot is a conveyance of an aliquot portion of the total area of the lot, quite irrespective of any question as to the value of the different parts of the lot. The purchaser of the west half of this lot acquired the west half of the total area. We must interpret the deed, which is quite free from any ambiguity, by the words used; and, in the absence of any claim for reformation, must avoid assuming any intention other than that expressed in the deed. If there has been any mistake, and the deed does not express the intention of the parties, then, in a properly constituted action, it might be reformed; but, until reformed, we, as well as the parties, are bound by its terms. I can imagine nothing more dangerous than to depart from the terms of a document in an attempt to give effect to what we imagine must have been the intention of the parties.

If the parties were tenants in common, and our task was to partition the lot, we would be bound to attempt to attain equality in value; but, where the parties have divided the land, not on the basis of equality in value, but of equality in area, and a price has been agreed upon for that which the purchaser receives, I can find no warrant for the introduction of the idea of equality in value.

The parties, no doubt, contemplated a division by a line parallel to the side lines of the lot and at right angles to the front, as the lot is said to be on the north side of Dundas street. To substitute for this a line neither party desires, and having in it an angle, it seems to me, cannot be justified as an admissible interpretation of the deed, no matter how satisfactory a partition it may be if we start with the assumption that the lot must be divided into halves having equal value and equal area.

I would, however, point out that, if the frontage on Ridgeway

street has any value, there is no equality in the proposed partition.

The letter referred to by my brother Latchford is not, I venture to think, admissible in evidence; and I cannot see how anything that took place between the parties prior to the conveyance of the west half can be used against the purchaser of the east half, who had no notice, and who has duly registered his deed.

We must assume that the parties knew what was being conveyed, and fixed the price accordingly; if so, there is no hardship; if not, the remedy is not to be found by departing from the language used in the deed.

I arrive at the same conclusion as the learned County Court Judge, but by another route; and would dismiss the appeal with costs.

*Appeal allowed; MIDDLETON, J., dissenting.*

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## HOLMAN v. KNOX.

*Landlord and Tenant—Lease—Covenants to Repair and Keep in Repair—Breach—Taking down Party Wall—Absence of Permission—Notice to Repair, Specifying Breach—Sufficiency as Notice of Forfeiture under Landlord and Tenant's Act, sec. 13—Continuing Breach—Right of Re-entry—Relief against Forfeiture—Terms—Restoration of Wall—Specific Performance—Mandatory Order—Waste—Other Relief—Waiver—Receipt of Rent after Breach—Trustees—Notice Signed by one only—Sufficiency—Solicitor and Client Costs—Power of Court.*

The defendants were lessees from the plaintiffs of certain lands and premises. The defendants took down a portion of a party wall which was a part of the demised premises. This was done without the leave of the plaintiffs. On the 6th July, 1909, the plaintiffs served upon the defendants a notice, which recited that the plaintiffs had entered the demised premises to examine the condition thereof and had found want of reparation, to wit, that openings had been made in the wall and part thereof had been demolished and removed, and had not been restored, and required the defendants "to well and sufficiently repair and make good the said want of reparation by well and sufficiently restoring said wall to its former condition and closing all openings therein, within three calendar months next after the giving of this notice." On the 22nd October, 1909, without further notice, the plaintiffs began this action for possession, basing their claim on breaches of covenants in the lease. The lease contained a covenant to repair and a covenant to repair on three months' notice:—

*Held*, assuming a breach of the covenant to repair, that the breach was a continuing one; that the notice given was not a complete waiver of that covenant; that, after the expiration of the time named in the notice—the repairs not having been made—the right of action for possession accrued; that a new notice was not necessary, the one given being sufficient under sec. 13 of the Landlord and Tenant's Act; but that the Court should, under sub-sec. 2 of sec. 13, relieve against the forfeiture, upon reasonable terms.

The premises demised consisted of a vacant lot and the party wall referred to, which was left standing after a fire which destroyed the buildings. New buildings were afterwards erected. The lease provided that the lessee should have "the right and liberty to maintain, continue, use, build, and rebuild such wall:—"

*Held*, that the removal and destruction of the wall was a breach of the covenant to repair, which, in its extended form, is, to "well and sufficiently repair, maintain, amend, and keep."

Review of the authorities.

*Held*, also, that the Court had no power to order payment by the defendants of the plaintiffs' costs as between solicitor and client: the plaintiffs were trustees, but the action was not in respect of the trust; and in an ordinary case payment of such costs can be ordered only as the price of an indulgence.

*Per MIDDLETON, J.*—Restitution could not be ordered in specific performance of the covenant to repair.

*Per CLUTE, J.*—Even if there was no forfeiture giving a right of re-entry, the plaintiffs would be entitled to relief, because waste had been committed of such a nature that a mandatory order to restore the wall would be the only sufficient and appropriate remedy; and also because, a sufficient notice to repair having been given, and the repairs not having been made within the time limited by the notice, a right of action arose, not only for forfeiture, but also, if forfeiture was not available, for other relief, and the appropriate remedy would be to restore the wall.



*Per CLUTE, J., also:*—The receipt by the plaintiffs, after breach, of sums equivalent to rent, was not a waiver of the right of forfeiture, the receipt being expressly without prejudice to the plaintiffs' rights.

*Per CLUTE, J., also:*—The notice, signed by one of the trustee-plaintiffs, and adopted by all, was sufficient.  
Judgment of SUTHERLAND, J., varied.

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Two actions by the trustees under the will of The Honourable William McMaster, deceased: (1) for an injunction restraining the defendants, the lessees from the plaintiffs of the premises on the north-west corner of Queen and Yonge streets, in the city of Toronto, from taking down the wall between the building on the land demised to them by the plaintiffs and a building adjoining it, upon land also demised to the defendants, and for damages; and (2) to recover possession of the land demised and damages, the plaintiffs alleging breaches of covenants in the lease. The actions were consolidated.

April 19, 1911. The consolidated action was tried before SUTHERLAND, J., without a jury, at Toronto.

*W. N. Tilley*, for the plaintiffs.

*E. D. Armour*, K.C., for the defendants.

October 24, 1911. SUTHERLAND, J.:—This is an action with reference to demised premises. As the title and facts in question are sufficiently set out in the statement of claim, I quote the following paragraphs therefrom:—

“(1) By an indenture of lease dated the 27th day of June, 1895, made in pursuance of the Act respecting Short Forms of Leases, Her late Majesty Queen Victoria, represented therein by The Honourable William Harty, Commissioner of Public Works for Ontario, demised to Philip Jamieson, of the city of Toronto, all and singular that certain parcel or tract of land and premises situate, lying, and being in the said city of Toronto, in the county of York, more particularly described as follows: being part of park lot number nine in the first concession west of the River Don on the north-west corner of Yonge and Queen streets in the said city, being butted and bounded as follows: commencing at the south-east angle of said park lot number nine, thence about north sixteen degrees west parallel to and along the western side of Yonge street and the eastern limit of the said park lot number nine, forty feet; thence about south seventy-four degrees west parallel to Queen street and the front of the said park lot number

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nine, eighty-two feet and six inches more or less, to the westerly boundary of that part of the said park lot number nine conveyed by The Honourable George Crookshank and James B. Macaulay, then one of the Justices of the Court of King's Bench in Upper Canada, to the late John McIntosh; thence about south sixteen degrees east parallel to Yonge street and the eastern limit of the said park lot number nine, forty feet more or less, to Queen street and the front of the said lot number nine; thence about north seventy-four degrees east along the front of said lot number nine and the northerly boundary of Queen street, eighty-two feet and six inches more or less, to the place of beginning; together with the wall (about eighteen inches thick) described in a deed dated the 19th day of July, 1867, made between Charles McIntosh, of the first part, and the Board of Agriculture for Upper Canada, of the second part, as projecting nine inches upon the next adjoining land to the north of the parcel of land above described, and the right and liberty to maintain, continue, use, build, and rebuild such wall as granted to the Board of Agriculture for Upper Canada by virtue of the provisions of the said deed, subject to the lessee assuming the obligation (if any) existing on the part of the grantee under the said deed or the lessor to maintain or repair the said wall as appurtenant to the land thereby demised; together with all easements and appurtenances thereto appertaining, for the term of twenty-one years, at the yearly rental of \$4,000 payable quarterly as therein mentioned.

"(2) By the said indenture (to which for the full and exact terms thereof the plaintiffs will refer) the said Philip Jamieson covenanted, for himself, his executors, administrators, and assigns: (a) to repair the said premises and keep the same in repair in accordance with the terms of the covenant in the said indenture contained; (b) to repair the said premises according to notice in writing in accordance with the terms of a covenant in the said indenture contained.

"(3) The said indenture of lease contained a proviso for re-entry in case of breach or non-performance of any of the aforesaid covenants.

"(4) Afterwards on the 27th day of June, 1899, by an indenture bearing that date Her Majesty the late Queen Victoria did grant the said premises as above described to Humphry Ewing

Buchan, Charles J. Holman, Daniel Edmund Thomson, and James Short McMaster, trustees under the last will and testament of The Honourable William McMaster. The said Humphry Ewing Buchan died on or about the 17th day of October, 1907 and the said premises thereupon became and are now vested in the plaintiffs.

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"(5) Afterwards during the said term the said term became and was vested in the defendants as assignees of the said term, and they took and now hold possession of the said demised premises."

The defendants are also lessees from the Jones estate of the building situated on the property north of that already referred to.

Jamieson had erected on the land so leased by him as aforesaid the building which is now upon the property, and in doing so had utilised the wall erected on the projecting nine inches hereinbefore mentioned as part of the north wall of the said building.

The defendants, being the lessees of the two adjoining buildings, conceived the idea of tearing down in part the wall between them, so as to make openings sufficiently large to utilise the two stores practically as one. Without asking the consent of the plaintiffs, their lessors and the owners of the wall in question, they, on or about the 20th March, 1909, made the first opening in the wall.

On or about the 30th March, 1909, the plaintiffs learned, through some "slips" received from certain insurance agents, that the defendants were apparently intending to make alterations in their premises, "including openings communicating with building 182 and 184 Yonge street." Thereupon the solicitors for the plaintiffs wrote a letter containing the following: "We represent, as you know, the owners of the land, and would be glad to know, before there is any interference with the outer wall, just what is proposed." The receipt of this letter was acknowledged by a letter from the defendants' solicitors on the following day.

An interview was then arranged and took place on the 5th April, 1909, between the defendant Good and the plaintiff D. E. Thomson at the latter's office, to which Good was accompanied by two men named Patterson and Witmer. When they arrived, Thomson, who is a solicitor, as well as one of the plaintiff trustees, was engaged in his private room with other people and was called

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out to speak to Good. Thomson says that the interview was somewhat short and hurried, assigning two reasons, one that he himself was engaged with other people, and that Good was in a hurry, as he was leaving Toronto for Buffalo by an early train.

He also says that the main portion of the interview was with Good alone, and that just at the last the other two men were present and heard part of the conversation. He states that Good intimated that he desired to make openings in the wall, and would do everything to the satisfaction of the plaintiffs, adding that he would give security to restore the wall, mentioning a security company, and that he had an architect who would do the work under the supervision of the plaintiffs' architect; that the plaintiffs could select an architect, and the defendants would pay all expenses.

Thomson states that his position at the moment was, that he did not know just what the nature of the plaintiffs' title to the wall and the conditions of the lease were, and that he intimated to Knox that he had not looked into the matter or examined the papers. He said that Good said he would arrange to have Patterson, the defendants' inspector, or the manager, and Witmer, their draftsman, call the next day.

Thomson's evidence is, that no understanding of any kind was come to that day. The defendant Good, on the contrary, says that at the interview he told Thomson that they had already made an opening and perhaps had exceeded their rights. He also says that he shewed Thomson the sketches indicating the proposed openings. He adds that Thomson thereupon gave him permission to go on and complete the work. He admits that the main part of the conversation was between him and Thomson, but adds that he repeated, in Thomson's presence, to Patterson and Witmer, that Thomson had said that the defendants could go on with the work.

Good admitted on cross-examination that there was a discussion between him and Thomson about an agreement to be signed, and that Thomson was to prepare the agreement, which was to be submitted to the defendants and sent by mail to Buffalo for that purpose. There was a discussion between Good and Thomson about the latter's architect.

On the following day, Wightman, the defendants' Toronto

manager, and Witmer called at Thomson's office, when the latter sent for the plaintiffs' title papers and looked them over. He thereupon intimated to them that he would send to the registry office and get a copy of a certain document and see them the next day.

There was a further interview on the following day, when Wightman and Witmer saw Thomson. On this occasion, Burke, an architect employed by the defendants, was also present. A discussion occurred between Burke and Witmer as to what was necessary in order to render the wall safe. On this occasion there was a discussion between Thomson and Wightman as to the terms on which the defendants had secured permission from the Jones estate as to their portion of the wall. As a result of this talk, Thomson's legal firm wrote J. Gordon Jones a letter, dated the 7th April, 1909, which, with some further correspondence put in at the trial as exhibit 7, was objected to by counsel for the defendants, but which I admitted as part of the surrounding circumstances.

Thomson says that, at the interview last-mentioned, it was arranged between himself and Wightman that he should write to the Jones estate. A letter was written, and in it the following expression is used: "Knox and Company, who bought out Jamieson's interest, are asking our clients' approval for removing the party wall on the ground floor storey," etc.

Apparently the matter of the preparation of the written agreement was not promptly proceeded with.

Patterson also testified to the fact that a written agreement was to be prepared and sent to Buffalo. He says that no details of it were discussed in his presence. He corroborates Good as to the latter's statement that Thomson gave leave to proceed with the work. He admits that he heard Thomson say he wanted to look into their rights, and that, before preparing an agreement, he would have to look into the matter. He also says that Good stated that he was under heavy expense and wanted Thomson to hurry up about the agreement so as to get at the work.

Nothing apparently having been done in the meantime about the written agreement, Thomson accidentally discovered, in passing the building in question on the 21st May, 1909, that the work was being proceeded with, and thereupon on the 22nd May caused a

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letter to be written in the following terms to the defendants: "We have just learned from Mr. Burke that the tearing down of the party wall has already been begun. Our understanding was that nothing should be done until there was a satisfactory agreement between you and our clients, or whether it should be a three party agreement with Mr. Jones included. We came to the conclusion Mr. Jones was not a necessary party to the agreement, as he admits the wall belongs to us. Possibly we ought to have communicated this to you, but we expected to hear from you before anything was done, when we could have reported as above. You must remember this party wall is not a part of the building owned by the late Mr. Jamieson and purchased by you. It belongs to our clients. We must ask you to stop work until matter arranged."

To this letter a reply from the defendants was written dated at Buffalo, the 24th May, as follows: "Your kind favour of May 22nd to our Toronto address was forwarded to this office, and in reply would say that the writer, Mr. Good, if you will recall, was in your office in Toronto and discussed this matter with you and arranged to have our Mr. Patterson call on you the next day. We presumed that he had done so and that everything was satisfactory for us to go ahead. As a matter of fact this never came back to my notice again until we received this letter. We have to-day communicated with our solicitor, Mr. Charles H. Ivey, of London, and requested him to call and see you Tuesday and to arrange everything satisfactorily. It is certainly our intention to respect every right you have in the premises, and have so instructed our solicitor, as we are not at all desirous of taking any advantage of your clients in this matter in any way. Trusting Mr. Ivey will be able to arrange everything in a satisfactory manner, we remain."

Patterson testified that the work of taking out the stone and brick from the wall was completed within two or three days after the 24th May. The opening made is a very large one, and extends from about 5 feet from the front or Yonge street wall back to about 12 or 15 feet from the rear wall, pillars or columns being put in to replace the wall and as supports.

The defendants gave some evidence as to an arrangement made with Thomson under which the plans of the proposed alterations and openings were to be submitted to Burke; but their

own witness, Witmer, on being asked about this, testified that the plans were not submitted to Burke. They were submitted to the city architect for approval, certain municipal regulations requiring that to be done. Witmer does say, later on in his evidence, that Burke saw the working plans and made no objection to them. Thomson denied that there was any arrangement made that, if the plans were satisfactory to Burke, he would be satisfied. He says that Burke did not approve of any plans. He does state that the details of the plans in connection with the proposed alterations were to be submitted to Burke, but added that nothing was to be done before he (Thomson) passed upon the matter. He says that, after the 6th April, when Burke was present, he never heard from him again until the 21st May, when, on seeing that the work was going on, he telephoned Burke about it. Burke had died before the trial of the action.

On the 24th May, Ivey called to see Thomson, and there was a discussion as to the terms of the agreement, particularly the question of security. Ivey asked that there should be no obligation on the part of the defendants to replace the wall until the end of the term. In an interview on that or the next day, reference was made to a clause in the Jones lease which apparently provided for the replacing, at any time desired by the lessors, of any portion of the wall taken down. Thomson was insisting that any alterations made should be replaced on reasonable notice. He says that he pointed out that the defendants were already obliged to do that under the terms of the Jones arrangement.

A draft agreement was prepared by Johnston, a law partner of Thomson, and was put in as exhibit 10. It contains a clause to the effect that the lessees would at any time, on receiving six months' notice in writing from the trustees (plaintiffs) so to do, restore the said wall and every part thereof in a good workmanlike manner, etc. The draft agreement was sent by the plaintiffs' solicitor to Mr. Ivey in a letter dated the 27th May.

On the 9th June, 1909, Mr. Thomson wrote a letter to Mr. Ivey as follows: "The writer is sorry to have been out of town when Mr. Good and yourself called last week. Mr. Johnston understood that you would be here again to close matter by yesterday at the latest. Have had no word from you, however. It is, you will appreciate, quite out of the question for us to allow

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the matter to drift much longer. As indicating our clients' attitude, we may say to you that they are disposed to meet you generously on the matter of security, but are not disposed on any terms to forgo the right to have the wall restored on reasonable notice.

On the 10th June, Mr. Ivey replied as follows: "I beg to acknowledge receipt of your favour of 9th inst. in reference to this matter, and have written Mr. Good asking him the earliest date he can meet me in Toronto for the purpose of closing the matter. As soon as I hear from him I will let you know."

On the 14th June, the plaintiffs' solicitors telegraphed to Mr. Ivey at London: "Impossible allow Knox McMaster drift longer. Must institute proceedings unless arranged immediately." And wrote a letter on the same day to the same effect.

On the 19th June, the plaintiffs' solicitors wrote to Mr. Ivey again, as follows: "In view of the stand taken by your clients at Wednesday's interview, there seems no way but to institute proceedings. Kindly let us know by return whether you will accept service of process for Messrs. Knox and Good and oblige."

To which Mr. Ivey replied on the 21st June, stating that he had "written Mr. Good in reference to the matter with a view of making one more effort towards an amicable settlement, but have not yet heard from him."

The plaintiffs' solicitors wrote to the defendants' solicitors on the 22nd June, as follows: "We have your letter of the 21st inst., and we note that you have written to Mr. Good, from whom you expect to hear shortly. In view of the arrangement between us that our clients are not to be in any way prejudiced as to any of their rights by reason of their refraining from taking immediate proceedings, there is no reason why we should not wait until you hear from Mr. Good. At the same time, we cannot let the matter stand indefinitely, in view of what we take to be the extraordinary contention of Mr. Good that, though an agreement had to be entered into between us, he was to be permitted, before any agreement was made, to demolish our clients' wall and do with it as he chose. The wall is part of the tenement leased, and is covered by the covenant to repair contained in the lease; and, altogether apart from this, we are satisfied that the action of your clients in demolishing the wall amounts to waste, giving



us an immediate right to an injunction and a mandamus. The proposition that we have already made to Mr. Good is eminently fair, and we shall certainly not be disposed to renew it if we have to take proceedings. Please let us hear from you as soon as you hear from Mr. Good."

On the 2nd July, 1909, Mr. Thomson wrote the defendants at Buffalo, as follows: "I am this morning in receipt of the enclosed cheque and form of receipt. You have marked the cheque in the written part as 'rent in full to 1st October, 1909.' It is then stamped 'rent in full to 1st August, 1909.' Both dates are wrong. The amount covers only to 1st July, 1909. Hence I return cheque. Besides this, it is my contention, as Mr. Ivey is aware, that the destruction of the wall amounts to a breach of covenant, entitling the landlords to forfeit the lease. As, however, Mr. Ivey and Mr. Good have all along stated that anything that may take place between us, until our rights have been determined or until some settlement has been reached, shall be without prejudice to our respective contentions and rights (whatever they may be), I am willing to accept cheque for \$1,000 on these terms as being in full up to the 1st inst. Yours truly, D. E. Thomson."

To this letter the defendants replied on the 6th July, as follows: "We wish to acknowledge receipt of your favour of July 2nd, with which you return the cheque which we mailed you on June 30th, account of the notation written thereon in reference to the period of time covered by the rent cheque. Your statement in reference to the matter is correct, and we very much regret that this incorrect notation was made on the cheque by the party who drew the same, which error was undoubtedly occasioned from the fact that, with few exceptions, we always pay rent in advance, and for this reason the party evidently assumed that the check covered rent from July 1st to Oct. 1st, instead of from April 1st to July 1st. Yesterday being a legal holiday, your communication was not received until this morning, and we are pleased to herewith enclose a cheque covering the proper period of time, and trust you will receive the same without delay."

On the 7th July, Mr. Thomson replied as follows: "I am duly in receipt of your letter 6th inst. with cheque as stated, but saying nothing about the condition mentioned in my last letter, without which I am not in a position to accept the cheque. I return same

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herewith. If you will strike out the word "rent" and make it read simply, "in full to July, 1909," and will say explicitly that the payment is made without prejudice to the rights and contentions of the parties, I will accept it. My position is, that I am willing to accept \$1,000 in full to 1st inst., irrespective of whether same is to be treated as rent or for use and occupation, but am not in a position to accept payment of rent until the point between us has been settled, or some satisfactory agreement come to."

In answer to this the defendants wrote on the 9th July, as follows: "In reply to your kind favour of July 7th, would say that we are herewith returning to you a cheque written as you suggest, and the understanding is, that your acceptance of the cheque shall be without prejudice to your rights. We have no desire to be technical and trust this is satisfactory. If not, kindly write us and we will make any change that you wish that is consistent with our rights in the matter."

Receipt of this was acknowledged by letter from Thomson to the defendants dated the 10th July: "I have to acknowledge with thanks receipt of your letter of the 9th inst., returning cheque with the word 'rent' struck out, and agreeing that same may be accepted without prejudice to the rights of the parties, which is satisfactory."

Thomson says that not until some time after the letter of the defendants dated the 24th May, and at one of the personal interviews, did the defendants for the first time put forward the suggestion that they had had permission to make the openings before the agreement was made. This is what he meant by the "extraordinary contention" in the letter of the plaintiffs' solicitors to the defendants' solicitors of the 22nd June.

No arrangement having been come to between the parties, on the 29th June, 1909, the plaintiffs issued a writ, asking "for an injunction restraining the defendants from tearing down, demolishing or removing any part of the wall belonging to the plaintiffs as landlords and leased to the defendants", and caused the same to be served upon the defendants.

On or about the 6th July, 1909, the plaintiffs caused to be served upon the defendants a notice to the following effect:—

"To Seymour H. Knox and Daniel Good.      Sirs:

Having this day entered (to examine the condition thereof) the demised premises situate at the north-west corner of Queen and Yonge streets, in the city of Toronto, now occupied by you under lease thereof bearing date the 27th day of June, 1895, and expressed to be made between Her Majesty the Queen, represented therein by The Honourable William Harty, the Commissioner of Public Works for Ontario, as lessor, and one Philip Jamieson, of the city of Toronto, in the county of York, merchant, as lessee, whereby Her Majesty the Queen did demise and lease to the said Philip Jamieson the lands therein particularly described, together with the wall described in deed dated the 19th day of July, 1867, and made between one Charles McIntosh, of the first part, and the Board of Agriculture for Ontario, of the second part, and having on such examination found the following want of reparation, to wit, that openings had been made in the said wall and part of the same has been entirely demolished and removed, and said openings and portion of wall removed have not been restored:—Now we hereby give you notice to well and sufficiently repair and make good the said want of reparation by well and sufficiently restoring said wall to its former condition and closing all openings therein within three calendar months next after the giving of this notice. Dated at Toronto this sixth day of July, 1909. Trustees under the last will and testament of The Honourable William McMaster, per D. E. Thomson, one of said trustees.”

On the 22nd day of October, 1909, the plaintiffs issued another writ against the defendants, claiming to recover possession of the land in question, by reason of breaches of covenants to repair contained in the lease in question and of the powers of entry therein contained.

The two actions were consolidated by order of the Master in Chambers dated the 6th November, 1909.

The plaintiffs further allege in their statement of claim that shortly prior to the 29th June, 1909, the defendants made openings in the wall described and demolished part of the wall and removed the same from the premises, and in doing so committed a breach of the covenants contained in the lease for re-entry in case of breach or non-performance of such covenants. They also allege therein that the period of three months mentioned in the notice before

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referred to had expired, and that the defendants had failed to remedy the breaches. They accordingly claim to recover possession of the premises, ask for money damages for the breaches, an injunction to restrain the defendants from further breaches, and such further or other relief as may be just.

The defendants in their statement of defence deny that before the action was brought for possession on the 22nd October, 1909, the plaintiffs had served a notice such as is required by the Act respecting Landlord and Tenant, and allege that, in consequence, the plaintiffs cannot maintain an action for possession of the lands.

They further say that, if the taking down of part of the wall was a breach of any covenant contained in the lease, which they deny, the plaintiffs accepted rent which accrued after such alleged breach and before the issue of the writ claiming possession, and thereby waived their right of re-entry, if any they had.

They also set up that, before making the openings in the wall, they obtained the consent of Thomson thereto, and they say that the whole work was done and completed before, at, or about the time when the first of the above-mentioned writs was issued, on the 29th June, 1909.

They also allege that, under the terms of the lease in question, the Board of Agriculture, the predecessors in title of the plaintiffs, granted to the lessee and his assigns the right and liberty to maintain, continue, use, build, and rebuild such wall, and that, therefore, they had a right to alter, maintain, and rebuild at their pleasure the said wall, pursuant to the said terms and the effect of the said deed and lease.

They ask, in any event, and should the Court be of opinion that the acts complained of constitute a breach of the covenants of the lease, that they may be relieved against the said alleged breaches, upon such terms, having regard to all the circumstances, as shall seem just and proper to the Court.

The question as to whether the plaintiff Thomson did or did not, knowing that an opening in the basement had already been made, give permission to the defendants, at the interview on the 5th April, 1909, to go on with the main portion of the work to be done pending an agreement to be made between the parties, is a matter of importance in determining this action.

I have come to the conclusion that the testimony of Mr.

Thomson is to be preferred to that of the defendants. On the face of this matter, it seems incredible that any man, much less an experienced lawyer and trustee, without consultation with the two other plaintiff trustees, and without knowing from the documents to be resorted to just what the rights of his *cestuis que trust* were, would off-hand, and that in a somewhat casual and hurried interview, give such an important consent.

He says himself that he met the defendant Good courteously in the matter and expressed a willingness to facilitate the wishes of the defendants in every possible way. He denies expressly that he then or at any time gave any consent that the work should proceed before a proper written agreement was arrived at. He stated that he told the parties at the first interview that he would have to look into the matter, and in this he is corroborated by Patterson, called for the defendants.

Thomson says that the next day he told the persons who saw him then on behalf of the defendants, that he had not had time to look into it. Patterson says that he does not remember this being said by Thomson on that day. It is admitted that a written agreement was talked of and was to be prepared. But the subsequent conduct of and correspondence between the parties confirm the view that no consent was given by Mr. Thomson on behalf of the plaintiffs.

When express objection was taken by the plaintiffs in their letter to the defendants of the 22nd May in these words, "Our understanding was that nothing should be done until there was a satisfactory agreement and security for replacing the wall," the defendants, in their written reply dated the 24th May, did not pretend that they had obtained a consent from Thomson on the 5th April, but put the matter in this way: "Mr. Good, if you will recall, was in your office in Toronto and discussed this matter with you and arranged to have our Mr. Patterson call on you the next day. We presumed that he had done so, and that everything was satisfactory for us to go ahead."

The fact appears to be that the defendants were very anxious to proceed with the work, and assumed, without leave or license, to go on with it and take the chances.

I, therefore, find as a fact that no leave was given to the defendants to proceed with the work as they allege. I think,

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that, under the terms of the lease, the defendants had no right to make openings of the kind they did in the wall in question, and that their so doing was a breach of the covenants to repair and keep in repair contained in the lease. It is plain that the whole matter would have been satisfactorily arranged, a written agreement arrived at, and litigation avoided, if the defendants had consented to a term being placed in the proposed agreement to the effect that the wall would be replaced by the defendants on reasonable notice. The defendant Good in his evidence admits that the defendants would not agree that they would restore on three months' or six months' or any notice. As he puts it, "We split on that."

Their conduct in this respect was unreasonable. Surely the least they could do, when they had taken down a large part of the wall of their lessors' building without leave, was to consent to replace it on reasonable notice.

Even if the defendants had been able to make out the verbal permission suggested by them, it could not be held to be more than a permission to go on, subject to a reasonable agreement being entered into for the restoration of the wall. Such an agreement, a reasonable agreement in my view of the matter, was submitted to the defendants, who refused to execute it.

The plaintiffs ask that a forfeiture of the lease be declared and that they be given possession of the premises. As to this branch of the case several contentions are put forward on behalf of the defendants. In the first place, they say that the notice referred to in paragraph 7 of the plaintiff's statement of claim, and dated the 6th July, 1909, is not a notice given under sec. 13 of the Landlord and Tenant's Act, R.S.O. 1897, ch. 170, but is a notice given under the clause as to repair in the Act respecting Short Forms of Leases, R.S.O. 1897, ch. 125; and an examination of it would appear to confirm this view.

Section 13, sub-sec. 1, of the first-mentioned Act, is as follows: "A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, re-

quiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor for the breach."

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It provides that the notice should require the lessee to remedy the breach, and in any case require him to make compensation in money for the breach; and, if the lessee fail within a reasonable time thereafter to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money to the satisfaction of the lessor for the breach, then only the right of re-entry or forfeiture for the breach of the covenant or condition in the lease shall be enforceable by action or otherwise.

No mention is made of three months, although that might well be considered under the section, in certain cases, "a reasonable time." The notice should require "the lessee to make compensation in money." It does not. In the notice in question, served by the plaintiffs, the time given within which the repairs are to be done is the term of three months.

When we turn to the Act respecting Short Forms of Leases, the clause as to the form of this particular covenant reads as follows: "(6) And that the said (lessor) may enter and view state of repair, and that the said (lessee) will repair according to notice in writing," etc. And the extended form, as follows: "6. And it is hereby agreed that it shall be lawful for the lessor and his agents, at all reasonable times during the said term, to enter the said demised premises to examine the condition thereof; and further, that all want of reparation that upon such view shall be found, and for the amendment of which notice in writing shall be left at the premises, the said lessee, his executors, administrators and assigns will, within three calendar months next after such notice, well and sufficiently repair and make good accordingly, reasonable wear and tear and damage by fire, lightning and tempest only excepted."

The extended clause expressly mentions the term of "three calendar months next after such notice," and notifies the lessee to "well and sufficiently repair and make good" the want of reparation.

It would appear, therefore, that no notice as to the forfeiture

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of the lease, in the terms required by the Landlord and Tenant's Act, R.S.O. 1897, ch. 170, sec. 13, was given; and, consequently, that the landlord was not in a position, when the writ for possession was issued, to assert "a right of re-entry or forfeiture under any proviso or stipulation in" the lease.

The defendants also contend that there was a waiver by the plaintiffs of any breach, by their receiving rent on the 1st April, 1909, after notice that repairs were contemplated of the kind in question. It appears that a small opening in the wall had been made on or about the 20th March, 1909. When the plaintiffs received the rent on the 1st April following, they had no knowledge of this. I do not think that the receiving of the rent on the 1st April could be considered a waiver merely because, prior to that date, notice had been received to the effect that repairs were in contemplation, but no part of which repairs, so far as the lessors then knew, had been done. When the next instalment of rent for three months became payable on the 1st July following, and was finally accepted by the plaintiffs without prejudice to their rights, it is contended on behalf of the defendants that such acceptance was a complete waiver. They argue that the plaintiffs could not accept the rent without prejudice. But the correspondence filed on the trial of the action discloses that there was an express agreement on the part of the defendants at the time of the payment of this rent that it should be received without prejudice to the respective contentions and rights of the parties. At that time one of the contentions on behalf of the plaintiffs was, that the defendants had committed a breach of the lease by breaking through the wall, and had failed to repair as requested. The defendants also contend that the plaintiffs, by issuing the first writ, in which they claimed only an injunction and damages, thereby elected to pursue that remedy with notice and knowledge of the existing facts, and that that was an election which could not subsequently be altered and changed into a claim for a forfeiture and possession.

"A forfeiture is waived if the lessor elects not to take advantage of it, and shews his election either expressly, by a statement to that effect to the lessee, or impliedly, by acknowledging the continuous tenancy. And if the lessor, after a cause of forfeiture has come to his knowledge, does anything whereby he recognises the



relation of landlord and tenant as still subsisting, he is precluded from saying that he did not do the act with the intention of waiving the forfeiture:" *Fawcett's Landlord and Tenant*, 3rd ed., p. 499; *Evans v. Davis* (1878) 10 Ch. D. 747; *Moore v. Ullcoats Mining Co.*, [1908] 1 Ch. 575.

I do not think that the plaintiffs have made out a case for forfeiture of the lease, or that I can, on the facts in evidence, make an order giving them possession of the property. Even if a case for forfeiture had been made out, one would hesitate, in a lease of so much importance, to give effect to it, and would rather incline to relieve therefrom, if possible, and seek for and grant another appropriate remedy less drastic.

The defendants also contend that the taking down of the wall was no breach of the terms of the lease; that under its terms, viz., to "build and rebuild," they were entitled to take down a portion of the wall as they have done. I do not think this contention can be given effect to. I am of opinion that to make an opening in the wall of such a size as has been indicated was a breach of the terms of the lease as to "repair," and that this is particularly so in a case where the opening practically causes the building in question, which was an entire building before, to become a part of two buildings thrown together and used as one.

I find, therefore, that the defendants, by breaking into the wall in question, as disclosed in the evidence, committed a breach of the covenant to repair.

Then as to the claim for an injunction. The defendants contend that all the demolition complained of was done before the writ was issued, and that the claim for an injunction in it and in the statement of claim has in contemplation and refers to future breaches only. The defendants say that, since the writ was issued, they have not done any work about which the plaintiffs have complained or can complain, and do not contemplate doing any, and, therefore, there is nothing to which an injunction can apply.

They also argue that there is no request in the writ or in the statement of claim for a mandatory order compelling the defendants to restore the wall to its original position; and that, consequently, the plaintiffs cannot obtain such an order, except after amendment and on terms. But is this so? There is the

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following statement of fact set out in the sixth paragraph of the statement of claim: "The defendants made openings in the wall above described, being part of the said demised premises, and demolished part of the said wall and removed the same from the said premises, and in so doing the defendants committed a breach of the above-mentioned covenants contained in the said indenture of lease." There is a prayer for "such further or other relief as may be just." They complain of demolition; they ask for an injunction restraining from further similar acts; and they ask for such further or other relief as may be just.

The principle on which a relief not expressly asked for may, under a prayer for general relief, be granted is discussed and determined in the case of *Gaughan v. Sharpe* (1881), 6 A.R. 417. The head-note states: "If the allegations in a bill state a case entitling a party to relief, he may under the general prayer have it, though his specific prayer may have been for other relief; but a plaintiff cannot take advantage of the ambiguity of his own pleading so as to claim upon facts stated in the bill *alio intuitu*, a relief entirely foreign to the scope of the bill." See also *Johnson v. Fesenmeyer* (1858), 25 Beav. 88, affirmed in appeal in 3 De G. & J. 13; *Gunn v. Trust and Loan Co.* (1882), 2 O.R. 393.

I think that, under the prayer for general relief, the plaintiffs were, upon the pleadings and evidence, entitled to ask, as by their counsel upon the argument they did, and that it is proper and appropriate to grant, a mandatory order requiring the defendants, within a reasonable time, to restore the wall in question to the same condition in which it was before it was broken into by them. I make such order accordingly, and fix the period of restoration at one month.

No evidence as to damages to the reversion or as to what it would cost to restore the wall was given at the trial. The lease has some time yet to run, with rights of renewal; and damages to the reversion could not, one would think, in any event be large. I fix and allow to the plaintiffs the sum of \$10 as nominal damages for breach of the covenant.

The plaintiffs will have their costs of the action, which, under the circumstances, as they are trustees, will be costs as between solicitor and client.

The defendants appealed from the judgment of SUTHERLAND, J., and the plaintiffs cross-appealed.

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January 17, 1912. The appeal and cross-appeal were heard by a Divisional Court composed of CLUTE, LATCHFORD, and MIDDLETON, JJ.

*E. D. Armour*, K.C., for the defendants. The judgment appealed from is evidently wrong in awarding costs to the plaintiffs as between solicitor and client. There is no authority for such a direction. A more important objection to the judgment is, that the learned trial Judge had no jurisdiction, asserting as he did the non-forfeiture of the lease, to grant a mandatory order. The lack of a proper notice under sec. 13 of the Landlord and Tenant's Act was fatal to a case constituted as the plaintiffs' was, and the relief granted to the plaintiffs was in the nature of specific performance, and could not properly be granted, either on the pleadings and findings as they stand, or as a part of the "general relief" asked for in the statement of claim. No amendment was asked for at the trial, and it cannot now be given; and, if given, costs should at all events have been awarded to the defendants. The proper course for the trial Judge to have taken, when it was shewn that the plaintiffs' claim to forfeit the lease had failed, was to stop the action at that point. Even if the Court had jurisdiction to give "other relief" such as was granted in this case, it should not be granted where, as in this case, it is contradictory to the particular relief asked for in the action. "General relief" can only be of something germane to the particular relief prayed for: *Gaughan v. Sharpe*, 6 A.R. 417, 422; *Stevens v. Guppy* (1826), 3 Russ. 171; *Graham v. Chalmers* (1862), 9 Gr. 239; *Gunn v. Trust and Loan Co.*, 2 O.R. 393; *Jessup v. Grand Trunk R.W. Co.* (1882), 7 A.R. 128. The following cases were referred to as being similar to the case at bar: *Doe dem. Dalton v. Jones* (1832), 4 B. & Ad. 126; *Holderness v. Lang* (1886), 11 O.R. 1. No damage to the reversion has been shewn, and the landlords are protected by the tenants' covenant to "leave in repair" at the end of the term. As no damage was proved, none should have been allowed. Where there is a covenant to repair, the ordinary law of waste does not apply. There is no case in equity of specific performance of a covenant to repair: *Lucas v. Comerford* (1790), 1 Ves. Jr. 235, 3

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Bro. C.C. 166; *Mosely v. Virgin* (1796), 3 Ves. Jr. 184; Fry on Specific Performance, 5th ed., p. 48 *et seq.* As regards the necessity of a proper notice, it has been said by a great Judge that "the statute is cast in an iron framework," and where forfeiture is claimed by virtue of notice under the statute, it must be shewn to be in absolute conformity with the statute's provisions.

*W. N. Tilley and R. H. Parmenter*, for the plaintiffs. The \$10 damages and the costs are not matters of prime importance. The real issue is as to the right of the plaintiffs to have their wall restored. This is a matter in which they have a substantial interest, as the lease contains an express provision requiring the erection of a building according to an approved plan, to secure which a deposit of \$10,000 is required, and the building is to revert to the landlord in case the tenant does not require a renewal at the end of his lease. As to the propriety of making a mandatory order in such a case, while we are not in a position to cite a precedent, there seems to be no good reason why such an order should not be made. As regards the notice, it is submitted that the notice given was proper and sufficient under the statute. It is not necessary that the notice should require payment of compensation in money: *Lock v. Pearce*, [1893] 2 Ch. 271. [*Armour*. The defendants do not contend that the notice is bad on that account.] The form of notice given satisfies the object of the statute; and, if it does that, it is of no significance that it does something else as well. It was served both personally and on the premises, and it is thus shewn that the plaintiffs were endeavoring to comply with the terms both of the lease and of the statute. The following cases were referred to and discussed: *Doe dem. Morecraft v. Meux* (1825), 4 B. & C. 606. This case is relied on by the defendants, as shewing an abandonment of the forfeiture clause, but it was decided before the Conveyancing Act, and the statute now intervenes, and it should be given a liberal, and not a narrow or technical, construction: *Few v. Perkins* (1867) L.R. 2 Ex. 92, a case which explains the *Meux* case; *Penton v. Barnett*, [1898] 1 Q.B. 276, *per* Collins, L.J., at p. 281. This was a case very similar to the present, and is an authority for the validity of the notice. As to the intent of the Conveyancing Act and the liberal construction of the notice under it, reference was made to *Fletcher v. Nokes*, [1897] 1 Ch. 271; *In re Serle*, [1898] 1 Ch. 652, 656, 657;

*Pannell v. City of London Brewery Co.*, [1900] 1 Ch. 496. Reference was also made to Encyc. of Laws of England, vol. 7, p. 667, and cases there cited, especially *Doe dem. Vickery v. Jackson* (1817), 2 Stark. 293; *Gange v. Lockwood* (1860), 2 F. & F. 115. The *Holderness* case, cited on behalf of the defendants, is really in our favour, as the distinction is there drawn between alterations such as those made by the defendants in the present case, and such as are contemplated by the terms of the lease. The right "to build and rebuild" the wall, on which the defendants rely, is not a right to destroy it, as they have done. As to the power of the Court to give such a judgment as is here in question, reference was made to *Woodhouse v. Newry Navigation Co.*, [1898] 1 I.R. 161; *Allport v. Securities Corporation* (1895), 64 L.J. N.S. Ch. 491; Seton, 6th ed., vol. 1, p. 530, and cases there cited; *Attorney-General v. Furness R.W. Co.* (1878), 26 W.R. 650; *Lane v. Newdigate* (1804), 10 Ves. 192.

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*Armour*, in reply. It now appears that the plaintiffs rely upon forfeiture of the lease, and not upon their right to specific performance of the covenant to repair. This claim of forfeiture and right of entry, which is the subject of their cross-appeal, depends upon the sufficiency of their notice, which was evidently given under the lease and not under the statute. It is submitted that, by giving the notice in question, the plaintiffs elected to waive the forfeiture. Reference was made in this connection to the *Meux* and *Few* cases, also to *Foa's* Landlord and Tenant, 4th ed., pp. 654, 655, and to *Cove v. Smith* (1886), 2 Times L.R. 778. The notice was invalid, as it was not signed by the trustees, nor did it specify the particular breach of covenant of which the tenants had been guilty. The plaintiffs, by coupling a claim for an injunction with a prayer for forfeiture, had waived the latter: *Evans v. Davis*, 10 Ch. D. 747; *Moore v. Ullcoats Mining Co.*, [1908] 1 Ch. 575. The *Meux* case is not overruled by *Penton v. Barnett*. The breach complained of is not a continuing one, as it involves demolition, and not mere dilapidation, which would constitute a continuing breach. The right of the plaintiffs to forfeit, having once been waived, cannot now be revived, as in the case of a continuing breach. Their only remedy would be in damages. The *Allport* and *Furness* cases are not applicable, the former not being a case of waste, and the latter being a railway

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case, and an exception to the general rule. He cited *Hill v. Barclay* (1810-11), 16 Ves. 402, 18 Ves 56.

*Tilley*, in reply as to the plaintiffs' cross-appeal, referred to the Interpretation Act, as shewing the power of one trustee to give notice on behalf of the others. The statute does not require the notice to be signed. *Penton v. Barnett* is an authority as against the necessity of a new notice after the expiration of the time specified in the notice.

February 21. CLUTE, J.:—There were two writs issued, the first on the 29th June, 1909, and the second on the 22nd October, 1909,—the plaintiffs, under the first, claiming to restrain the defendants from tearing down the party wall and for damages for breaches of covenants to repair; and, under the second, claiming possession for breach of covenant and right of re-entry, under lease from the plaintiffs' predecessor in title to the defendants' predecessor in title.

The plaintiffs claim title by grant from the Crown dated the 27th June, 1899. Prior to their grant, the Crown had leased the property in question to one Jamieson, by lease dated the 27th June, 1895. The property is situate on the north-west corner of Yonge and Queen streets, with a frontage of 40 feet on Yonge street, and a depth of 82 feet 6 inches on Queen street, "together with the wall about 18 inches thick described in a deed dated 19th of July, 1867, made between Charles McIntosh, of the first part, and the Board of Agriculture for Upper Canada, of the second part, as projecting 9 inches upon the next adjoining land to the north of the parcel of land above described, and the right and liberty to maintain, continue, use, build, and rebuild such wall as granted to the Board of Agriculture for Upper Canada by virtue of the provisions of the said deed."

The McIntosh deed, here referred to, further provides that the wall may be used as a party wall by the grantee and the grantor, the latter being then owner of the property on Yonge street immediately north of the lands conveyed. This lease is made in pursuance of the Act respecting Short Forms of Leases, and includes the wall described in the McIntosh deed. In this lease the lessee covenants to build, at his own expense, under plans approved by the architect to be named by the lessor, a

building of certain description of the value of not less than \$25,000, the lessor to deposit \$10,000 to insure the performance of this covenant. At the date of the execution of the lease, the land was vacant with the exception of the wall on the north side referred to in the McIntosh deed, which was then standing, the building, of which it formed the north wall, having been burned.

The lessee covenants, in the usual short form, to pay rent and to repair, and that the lessor may enter and view the state of repair, and that the lessee will repair according to notice and will leave the premises in good repair.

The building was erected and occupied for some time by the tenant Jamieson, who assigned the lease to the defendants, and on or prior to the 12th March, 1909, the defendants went into possession.

The defendants are also tenants of the premises to the north, and occupy both premises as a store; and, for the more convenient use of the same, have taken down the partition wall between the two premises.

It appears from the evidence called for the defence that, on the 20th March, 1909, the defendants cut a door-way through the wall, without the knowledge or consent of the plaintiffs. This coming to the knowledge of the plaintiff Thomson, objection was made, and negotiations were entered upon and continued for some time, with a view of reaching an agreement permitting a further portion of the wall to be taken down; and from the evidence of both parties it appears that a written agreement was contemplated. This was drafted, but the parties differed as to what it should contain, and never reached a satisfactory conclusion. The defendants now contend that what was done was by leave. The trial Judge has found against them on this point.

The learned trial Judge refers fully to the various interviews had between the parties, and accepts the statement of the plaintiff Thomson as to what took place, as against the witnesses of the defendants, and finds as a fact that no leave was given to the defendants to proceed with the work, as they allege.

I have carefully read all the evidence, which, I think, fully supports such finding.

On the 6th July, 1909, the defendants gave the following notice: "To Seymour H. Knox and Daniel Good. Sirs: Having

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this day entered (to examine the condition thereof) the demised premises situate at the north-west corner of Queen and Yonge streets, in the city of Toronto, now occupied by you under lease thereof bearing date the 27th day of June, 1895, and expressed to be made between Her Majesty the Queen, represented therein by The Honourable William Harty, the Commissioner of Public Works for Ontario, as lessor, and one Philip Jamieson, of the city of Toronto, in the county of York, merchant, as lessee, whereby Her Majesty the Queen did demise and lease to the said Philip Jamieson the lands therein particularly described, together with the wall described in deed dated the 19th day of July, 1867, and made between one Charles McIntosh, of the first part, and the Board of Agriculture for Ontario, of the second part, and having on such examination found the following want of reparation, to wit, that openings have been made in the said wall and part of the same has been entirely demolished and removed, and said openings and portion of wall removed have not been restored:— Now we hereby give you notice to well and sufficiently repair and make good the said want of reparation by well and sufficiently restoring said wall to its former condition and closing all openings therein within three calendar months next after the giving of this notice. Dated at Toronto this sixth day of July, 1909. Trustees under the last will and testament of The Honourable William McMaster, per D. E. Thomson, one of said trustees.”

The extended form of the covenant to enter and view the state of repair, and to repair according to notice in writing, provides that all want of reparation that upon such view shall be found, and for the amendment of which notice in writing shall be left at the premises, shall be made within three calendar months next after such notice is given. The above notice is the form usually adopted under this covenant.

The trial Judge held that no notice had been given as to the forfeiture of the lease, in the terms required by R.S.O. 1897, ch. 170, sec. 13; and that the landlords were not in a position when the writ of possession was issued to assert a right of re-entry or forfeiture under the lease.

Sub-section 1 of sec. 13 provides that “a right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable,



by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor for the breach." The reparation must be made "within a reasonable time after notice."

The trial Judge found that the plaintiffs had failed to make out a case of forfeiture; but that, by taking down the wall, the defendants committed a breach of the covenant to repair. He entered judgment for the plaintiffs; and, under the prayer for general relief, directed that the defendants restore the wall in question to the condition it was in before it was interfered with, within one month, assessed \$10 for damages for breach of the covenant to repair, and gave the plaintiffs costs as between solicitor and client.

Mr. Armour's contention, as I understand it, is, that the notice is obviously given under the covenant to repair according to notice; that that was a waiver of the forfeiture (if there was one) under the covenant to repair; and the finding of no forfeiture was right. The action cannot be maintained under the second covenant, because the notice required by sec. 13, sub-sec. 1, of the Landlord and Tenant's Act has not been given; that the relief given cannot be granted, under the findings as they stand, or under the prayer for other relief, and no amendment was asked, and leave to amend should not now be granted; that the relief granted was in effect specific performance, which could not be given; nor had the Court jurisdiction to grant a mandatory order in a case of this kind; and that what was done by the defendants was within the right of the tenant under the lease.

On the first point, the case chiefly relied upon was *Doe dem. Morecraft v. Meux*, 4 B. & C. 606. In that case, a lease contained covenants to keep the premises in repair, and to repair within three months after notice, and a clause of re-entry for breach of any of the covenants, and the premises being out of repair, the landlord gave a notice to repair within three months. The notice to repair was given on the 7th August, 1823. On the 24th

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October, 1823, the lessor of the plaintiff received a half year's rent to the 29th September, 1823; and the declaration in ejectment (which was the commencement of an action of ejectment prior to the Common Law Procedure Act of 1852) was served on the 28th October, 1823, being prior to the expiration of the three months' notice to repair. The premises were and continued out of repair until the trial. Bayley, J., said that the landlord had an option to proceed under either covenant; and, after giving notice to repair within three months, he might have brought an action against the defendant upon a former covenant for not keeping the premises in repair. "But that is very different from insisting upon the forfeiture. It is said that the premises being out of repair on the 6th of August, when the notice was given, the lease was thereby forfeited. But the landlord has affirmed that the lease subsisted up to the 29th of September, by receiving the rent which became due at that period. It is plain, therefore, that he did not intend to insist upon an immediate forfeiture at the time when the notice was given, and I think that notice amounted to a declaration that he should be satisfied if the premises were repaired within three months, and that he thereby precluded *himself from bringing an ejectment before the expiration of that period.*" He further points out that "in *Roe dem. Goatly v. Paine* (1810), 2 Camp. 520, the language of the notice was very different, the tenant was required to put the premises in repair *forthwith*; that did not prevent the landlord from bringing his ejectment at any time." Holroyd, J., said: "I am of opinion that this ejectment was *brought too soon*, for it appears to me that the notice requiring the tenant to repair within three months was equivalent to an admission that the tenancy *would continue up to the expiration of that time.* If it did not operate as a waiver of the forfeiture incurred by breach of the covenant to keep the premises in repair, the landlord might be able to bring ejectment after the tenant had put the premises into complete repair pursuant to notice; which would be extremely unjust. But I think that although the action for breach of covenant would remain, yet the forfeiture was waived."

The *Meux* case decided that the effect of the notice was a waiver of forfeiture until after the expiration of the notice, by which time, if repairs were completed, no forfeiture would occur;

and, as the action was commenced before the expiration of the three months, it was premature. It does not decide that this was not a continuing breach, but rather implies the contrary; else what is the meaning of the statement that the landlord did not intend to insist upon an immediate forfeiture and that the notice amounted to a declaration that he would be satisfied if the premises were repaired within three months, and thereby precluded himself from bringing his action before the expiration of that period?

That case was referred to in *Few v. Perkins*, L.R. 2 Ex. 92, 95. There, under a similar lease, containing covenants on the part of the lessee to keep the premises demised in repair, and a further covenant that he would repair within three months after notice, the premises demised being out of repair, the landlord gave notice to repair in accordance with the covenants. *Before the expiration of three months*, ejectment was brought, and it was held that the notice was not a waiver of the forfeiture incurred by the breach of the general covenant to repair, and that the action was maintainable. Kelly, C.B., distinguished the *Meux* case by pointing out that there the notice was specific to repair within three months, and that in the case before him the notice was general in terms and similar to that in *Roe dem. Goatly v. Paine*, *supra*, where it was held to have no effect on the right of entry for breach of the general covenant. He then points out: "He has pursued the usual, though not necessary, course of giving his tenant notice to repair. *But he does not thereby lose his right of entry if the repairs are not effected by the tenant.*" Channell, B., refers to the observations of Bayley, J., and Holroyd, J., in *Doe dem Morecraft v. Meux*, but does not think that they apply to the facts of the case before him.

It will be seen on reference to the *Meux* case, that notice was given on the 6th August, and rent was received which became due up to the 29th September, which made it clear that an immediate forfeiture was not intended at the time when the notice was given, and indicated that the landlord would be satisfied if the premises were repaired within three months, thereby precluding himself from bringing ejectment before the expiration of that period. The declaration in ejectment was in fact served before the expiration of the three months' notice to repair.

It is said in Fawcett's work on Landlord and Tenant, 3rd ed.,

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p. 502, that where there is a general covenant to repair, and also a covenant to repair after notice, a notice to repair within a specified period, as three months, is a waiver of the general covenant, and there is no forfeiture till the period has elapsed, referring to the *Meux* case, and also to *Doe dem. de Rutzen v. Lewis* (1836), 5 A. & E. 277. In the latter case Patteson, J., refers to *Doe dem. Morecraft v. Meux*, and points out that Bayley, J., does not say that the party, by proceeding on the special proviso, waives his right to proceed on the other; but Holroyd, J., does say so. He also refers to *Doe dem. Rankin v. Brindley* (1832), 4 B. & Ad. 84. In that case there was a general covenant to repair, but no specific power for re-entry for breach of that covenant. Then there was a covenant for re-entry in case of non-repair within three months after notice, or in case of breach of the other covenants. Notice was given to repair within three months. Ejectment was brought before the *expiration of the three months*. On the trial, by consent an order of the Court was made that a juror should be withdrawn, and the repairs performed on or before the 24th June. Afterwards rent accrued, which the landlord accepted. This was before the 24th June, so that the forfeiture, which was afterwards incurred by not repairing on or before the 24th June, was not waived. Repairs not being performed on that day, ejectment was brought. The plaintiff had a verdict. The Court refused a rule for a new trial. It was held that the right of entry was at all events only suspended. Parke, J., said: "And the lessor of the plaintiff being unable to support that action, put an end to it by consenting to the order of the Court . . . it was merely a consent to postpone the time for completing the repair for the benefit of the defendant; and on his failing to comply with the terms, the lessor of the plaintiff might justly insist on his right of entry, and bring a new ejectment after the expiration of the enlarged time. The receipt of rent was only an admission that the defendant was tenant until the 25th of March, and could not operate as a waiver of the forfeiture." Taunton, J., was of the same opinion. This appears, having regard to the facts in that case, to have reference to the right of entry for non-repair after the expiration of three months' notice.

*Doe dem. de Rutzen v. Lewis* (*supra*) appears to be authority only for the view that, where a lessor has a remedy for recovering

the expense of repairing, and elects to do the repairs himself, he waives the forfeiture under the general covenant. Patteson, J., points out that the circumstances differ from *Doe dem. Rankin v. Brindley*, for the time is not enlarged for the benefit of the defendant. "The landlord says, I shall take advantage of the proviso enabling me to compel you to repair, or, if you do not repair within the two months, to perform the repairs myself, and, on so doing, to distrain, not to re-enter. The tenant thus has the option given him, and exercises it by not repairing. The relation of landlord and tenant is so far from being put an end to by this transaction, that it is affirmed, the tenant being placed in a situation different from that in which he would have been if the general proviso had been insisted upon."

In *Cronin v. Rogers* (1884), 1 Cab. & El. 348, a notice requiring a tenant to remedy a breach of covenant, by repairing premises within three months, expired on the 1st February, 1884. No repairs were then done, and on the 2nd February the rent due at Christmas, 1883, was accepted. It was held that the acceptance of the rent was no waiver of the breach of covenant.

*Coward v. Gregory* (1866), L.R. 2 C.P. 153, is a very important decision, bearing upon the question of waiver in respect of the general covenant to repair. In that case the lessor engaged to put the whole of the demised premises in repair and to keep in repair certain portions thereof. Two breaches were assigned, the first for not putting the whole of the premises in repair, and the second in not keeping in repair the portions mentioned in the covenant in that behalf. The first part was held not to be a continuing covenant, that that part of the covenant could only be broken once, and that damages under that breach was an answer to a subsequent action. As to the second breach for not keeping the premises in repair, that was held to be a continuing breach, for which prior action and recovery was no answer.

*Penton v. Barnett*, [1898] 1 Q.B. 276, is in some respects like the present case. It deals not only with the question of waiver, but also with the notice required under sec. 14 of the Conveyancing Act, which corresponds in this respect to sec. 13 of the Landlord and Tenant's Act. The lease contained a general covenant to repair and a covenant to repair within three months after notice. The premises being out of repair, the lessor gave

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notice to the lessee under the Conveyancing Act, 1881, to repair within a given time. Three days after the expiration of the notice, a quarter's rent became due. No repairs having been done by the tenant, the lessor brought an action to recover possession, and in the action claimed the quarter's rent. It was held that, the breach of covenant being a continuing one, no new notice was required in respect of the non-repair after the expiration of the time specified in the notice, and that the claim for rent did not affect the right to possession in respect of the non-repair after the date when the rent fell due. The dates are material. The lease was granted in 1873. In 1896 the premises were confessedly out of repair, and on the 22nd September the notice was given. The notice was given under the Act and was so held, and claimed compensation, which could only be done under the Act. The writ was issued on the 14th January, 1897, more than three months after the time mentioned in the notice had elapsed, and rent was claimed up to the previous 25th December. The defence was, that, by bringing the action to recover rent which accrued due after the alleged causes of forfeiture by reason of the alleged breaches of covenant to repair, with knowledge thereof, the plaintiff had waived the alleged forfeiture, and was not entitled to recover possession of the premises. At the trial judgment was given for the defendant. On the argument it was urged that the plaintiff must be taken to have elected to treat the breach of covenant as a forfeiture. The premises were still out of repair. The appeal was allowed. A. L. Smith, L.J., after referring to the facts, says: "It is perfectly well settled that the acceptance of rent is an acknowledgment of the existence of the tenancy, and if the case depended solely on that, I should have thought that the action was not maintainable; but it is pointed out that the claim for rent is at most an election to treat the defendant as tenant up to December 25, and that, inasmuch as between that date and January 14 following the premises were in the same state of disrepair in which they had previously been, there was a breach of covenant between those dates in respect of which the plaintiff could maintain his action for possession. In my opinion, apart from the Conveyancing Act, this contention is well founded. But then it is said that we must deal with sec. 14 of the Conveyancing Act, 1881. Under that Act a right of re-entry for breach of

covenant is not enforceable unless the lessor serves on the tenant a notice specifying the particular breach complained of, so that the tenant may have a reasonable time to remedy the breach and make reasonable compensation to the lessor. The defendant had such a notice, and a reasonable time in which to comply with it; but it is said that the notice does not cover the breaches between December 25 and January 14. In my opinion this answer is insufficient, because the breaches during this latter period are the same as those in respect of which the notice was given." Rigby, L.J., said: "This is the case of a lease which contained two covenants as to repairs—one a general covenant to repair as occasion should require, the other to repair within three months after notice. The power of re-entry applies to breaches of either of these covenants. Independently of the Conveyancing Act, directly the premises were out of repair the landlord had a right of re-entry under the lease; but he was not bound to re-enter on any particular day. At any rate, he had the power of re-entry so long as there was a broken covenant and a continuing breach. The position on January 14, 1897, would be that, as nothing had been done since the notice as to repairs, the plaintiff had the right to determine the tenancy by the issue of the writ, and to sue in respect of such rights as had accrued to him during the tenancy." He then refers to sec. 14 of the Conveyancing Act, under which notice was given on the 22nd September, 1876, and states: "It cannot be doubted that the time indicated by the notice was a reasonable time, for it is the time specified in one of the covenants to repair contained in the lease. The action could therefore be maintained by the lessor—that is to say, the conditions imposed by the Act had been complied with, and for the purposes of this case the lessor was in the same position as if there had been no legislation. Then he brought his action for possession, and in it he claimed for a quarter's rent due on the previous December 25. In my opinion, this claim does not constitute a waiver of the forfeiture. All that was laid down in *Dendy v. Nicholl* (1858), 4 C.B. N.S. 375, was that an action for rent was as good as a waiver of forfeiture as an action of ejectment was as a determination of the tenancy. If there had not been a recurring breach, but something which had happened once for all, the state of things might have been different; but in this case, in my opinion, there is

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nothing in the statement of claim inconsistent with an election to determine the lease from December 25." Collins, L.J., was of the same opinion: "It is not now denied that there was a breach which may be described as continuing or accruing day by day. That being so, but for the Conveyancing Act there would be no answer to the claim for possession. Undoubtedly the words of the statute do give rise to the contention put forward on behalf of the defendant. It is said that the breach of covenant in respect of which this action to recover possession is brought is not the antecedent failure to repair in respect of which three months' notice was given on September 22, but the failure to repair day by day after December 25, and that in respect of this a fresh notice must be given. If the section is to be construed with a great degree of strictness, that might be so. I think, however, that we ought to construe the words 'particular breach' in the section according to the obvious intention of the Legislature, which was that the tenant should be informed of the particular condition of the premises which he was required to remedy. The expression 'breach' means the neglect to deal with the condition of the premises so pointed out, and not merely failure to comply with the covenants of the lease. The common sense of the matter is, that the tenant is to have full notice of what he is required to do. He has had notice, and has failed to act on it; and with regard to that the physical condition of the premises which he was required to make good was the same when the action was brought as when the notice was given. Under these circumstances, I agree that the requirements of the Conveyancing Act have been complied with, and that the tenant has, within the meaning of sec. 14, had notice of the breach of covenant which is the foundation of the action."

Fawcett, in his able work on Landlord and Tenant, enumerates the instances in which a tenancy may be affirmed and forfeiture waived (p. 500) and says (at p. 501): "Where a writ claims possession for the forfeiture and also arrears of rent accruing due subsequently to the forfeiture, the latter claim operates as a waiver of the forfeiture," citing *Bevan v. Barnett* (1897), 13 Times L.R. 310, "though if the breach is a continuing one—as in the case of non-repair—the lessor may still be entitled to forfeit in respect



of the breaches subsequent to the date up to which rent has been claimed," citing *Penton v. Barnett* (*supra*).

As to the sufficiency of the notice, reference may be made to *In re Serle*, [1898] 1 Ch. 652. In that case the notice merely informed the lessee that he had "not kept the said premises well and sufficiently repaired, and the party and other walls thereof." It was held insufficient, as the notice did not direct the attention of the lessee to the particular breaches complained of, so as to give him an opportunity of remedying them before action.

In Roscoe's *Nisi Prius*, 18th ed., p. 1034, it is said that a waiver of a forfeiture incurred by a breach of a continuing covenant to repair is no waiver of a forfeiture for a subsequent breach, although merely a continuance of the original breach, citing *Doe d. Baker v. Jones* (1850), 5 Ex. 498. In that case it was also held that where the covenant was to repair within a reasonable time, and after breach the lessor received rent, he might bring ejectment immediately thereafterwards. Platt, B., says (p. 505): "It is a fallacy to say that the receipt of rent was a waiver of the breach of contract to repair, for it was a continuing breach, and until the repairs were perfected, the lessors of the plaintiff were entitled to re-enter for the forfeiture." And it seems that if an act of waiver takes place one day, a landlord may sue out a writ for a continuing breach on the next day: *Price v. Worwood* (1859), 4 H. & N. 512. In that case, in ejectment, against a tenant for forfeiture by non-insurance, brought on the 24th December, it was proved that rent had been paid on the 23rd December of the same year. Held, that there was evidence from which a jury might presume a continuing breach of the covenant to insure on the 24th December at the time the action was brought.

In the present case, the covenant to repair, in its extended form, is that the lessee will well and sufficiently repair, maintain, amend and keep said premises in good and substantial repair when, where and so often as need shall be, reasonable wear and tear and damage by fire, lightning and tempest only excepted. Having regard to the authorities above referred to and the wording of the covenant to repair, I am clearly of opinion that here there is a continuing breach of the covenant to repair, and that the effect of the notice was not a complete waiver of that covenant, but only delayed the right of action until after the expiration of the

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notice to repair, when, the repairs not having been made, the right of action for possession immediately accrued.

I am also of opinion that the notice given was sufficient under the 13th section of the Landlord and Tenant's Act, and the mere fact that it did not claim a certain sum for damages would not, I think, make it bad. The defendants had all the information which the Act requires to be given except as to damages, and as to that, I apprehend, the plaintiffs might waive their right; so that the plaintiffs' right to bring this action was complete after the expiration of the notice; and, having regard to the decision in *Penton v. Barnett (supra)*, the right of action for possession was also complete after the expiration of three months from the giving of the notice under the covenant to repair according to notice; and no further notice claiming the forfeiture was required. The notice in form was not limited to either the statute or the covenant, and was, I think, sufficient under both.

Although there was thus, in my opinion, a forfeiture entitling the plaintiffs to possession, the Court should, nevertheless, accede to the prayer of the defendants, under sub-sec. 2 of sec. 13 of the Landlord and Tenant's Act, and grant relief from the forfeiture.

I do not think effect can be given to the further contention of Mr. Armour, that the removal of the wall was within the rights of the defendants under the lease. The wall was a part of the demise, and the lessees thereby have "the right and liberty to maintain, continue, use, build, and rebuild such wall . . . subject to the lessee assuming the obligation (if any) existing on the part of the grantee under the said deed or the lessor to maintain or repair the said wall as appurtenant to the land hereby demised." So far from this clause having the effect contended for, it rather imposes upon the lessees and their assigns the obligation to maintain and repair it. It creates an obligation to maintain it, instead of liberty to remove it.

I am further of opinion that the receipt of rent without prejudice to the plaintiffs' rights precludes the contention that the receipt of sums equivalent to the rent was a waiver of the plaintiffs' rights of forfeiture in the lease.

I think the terms imposed by the trial Judge, to restore the wall within three months, are reasonable and appropriate. The time may be extended for that period from the date of this judg-

ment; and, in default of restoration within the time limited, the plaintiffs should be entitled to recover possession of the premises.

Objection was taken to the sufficiency of the notice, which was signed by Mr. Thomson on behalf of the trustees. This objection is, I think, untenable. It was given by one trustee and adopted by all, and, being sufficient under the statute, the objection fails.

Even should it be held that there was no forfeiture giving a right of re-entry, I am of opinion that the plaintiffs would be entitled to the relief given by the trial Judge: first, because waste had been committed of such a nature that under the circumstances a mandatory order to restore the wall would be the only sufficient and appropriate remedy. See the Encyclopædia of the Laws of England, vol. 14, p. 587; Fawcett on Landlord and Tenant, 3rd ed., pp. 348, 350; Woodfall's Landlord and Tenant, 18th ed., p. 695; Kerr on Injunctions, 4th ed., pp. 51 (a), 431, 432. Secondly, upon the ground that a sufficient notice having been given to repair, and the repairs not having been made within the time limited by the notice, a right of action arose under that covenant, not only of forfeiture, but also, if forfeiture for any reason was not available to the plaintiffs, for other relief, and for which the appropriate remedy would be to restore the wall. See Fawcett on Landlord and Tenant, 3rd ed., pp. 367, 373, and 375. At p. 338 it is said: "It is a breach of this covenant to pull down the demised premises either wholly or partially, or to open a doorway in a wall:" *Gange v. Lockwood*, 2 F. & F. 115; *Doe dem. Vickery v. Jackson*, 2 Stark. 293; and other cases there cited.

In *Allport v. Securities Corporation*, 64 L.J. N.S. Ch. 491, a tenant was in possession of rooms on the fourth and fifth floors of certain premises for residential purposes, with the use of the entrance hall, staircase, and lift. The landlord, without the consent of the tenant, and during his temporary absence, proceeded to make structural alterations in the premises, including (*inter alia*) the removal of the staircase, the tenant's access to his rooms being now by another staircase, which was a circuitous and less convenient route. On motion for injunction by the plaintiffs, the Court granted a mandatory order against the landlord to reinstate the staircase. North, J., said: "I think I ought to grant a mandatory injunction. It is quite clear, in my opinion, that the defendants have not any right to act as they have done. It

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is said that they may be able to find more evidence in their favour before the trial of the action, but I do not think they could find more than they have at present. Again, it is said that a mandatory injunction ought not to be granted on this motion, or indeed at any time, requiring the defendants to reinstate what they have pulled down. I refer to the case of *Lane v. Newdigate*, 10 Ves. 192, where, although the order specifically to repair the banks of a canal and stop gates and other works was refused, the Lord Chancellor said: 'So, as to restoring the stop gate, the same difficulty occurs. The question is, whether the Court can specifically order that to be restored. I think I can direct it in terms that will have that effect. The injunction I shall order will create the necessity of restoring the stop gate, and attention will be had to the manner in which he is to use these locks, and he will find it difficult, I apprehend, to avoid completely repairing these works'—that is, the order would create the necessity of restoring the stop gate and works. In *Rankin v. Huskisson* (1830), 4 Sim. 13, an injunction was granted on interlocutory application before answer, restraining the defendants from permitting to remain erected such part of certain buildings as had been erected in violation of the agreement between the plaintiff and the defendants; and in the case of *Morris v. Grant* (1875), 24 W.R. 55, the defendant, having after express notice erected a porch in breach of a covenant, was on motion ordered to remove the erection, although it had been completed before the filing of the bill. It is suggested that the plaintiff ought to have damages if any relief is granted, but, in my opinion, it is a case in which he has a right to say that his rights shall not be interfered with in a high-handed manner in his absence. I think it is a case which should be decided at once, and therefore I make the order now instead of directing that the motion stand to the hearing." See Lord Esher's observations on *Lane v. Newdigate* in *Ryan v. Mutual Tontine Westminster Chambers Association*, [1893] 1 Ch. 116, 124.

As to the question of costs allowed below between solicitor and client, it was argued that the trial Judge had no jurisdiction to impose such costs, and Mr. Tilley was unable to cite any authority where they had been allowed in a case similar to the present.

In *Andrews v. Barnes* (1888), 39 Ch. D. 133, it is said that the

Court of Chancery had, and the High Court of Justice now has, in matters of equitable jurisdiction, a general discretionary power to give costs as between solicitor and client. "The giving of costs in equity," said Lord Hardwicke, in *Jones v. Coxeter* (1742), 2 Atk. 400, "is entirely discretionary, and is not at all conformable to the rule at law." The former rule in the Chancery Court, above indicated, is in effect the present rule now applicable to all Courts. Nevertheless, even in equity, costs as between solicitor and client were not given except in special cases, such as suits affecting charity funds, administration suits, actions brought by trustees and in certain cases of misconduct, and where an arbitrator had power to dispose of the question of costs. In *Cockburn v. Edwards* (1881), 18 Ch. D. 449, it was held in appeal that the difference between solicitor and client costs and party and party costs in an action cannot be given by way of damages in the same action, the latter being all that the successful suitor is entitled to. In *Willmott v. Barber*, [1881] W.N. 107, it was held that the Judge had no jurisdiction to impose costs by way of penalty beyond the costs of the suit. See *Morgan on Costs*, 2nd ed., p. 5. In the present case it is true that the plaintiffs are trustees, but the action is not brought in respect of the trust or arising out of the will. The plaintiffs' claim is as landlords. I have been unable to find any case such as this where costs between solicitor and client have been given. It does not fall within the class of cases where such costs have been allowed, nor do I think the rule should be extended.

With deference, I think the trial Judge was in error in finding that there was a waiver of the forfeiture to re-enter. The covenant to repair, which includes the keeping of the premises in repair, is a continuing covenant, and the effect of the notice to repair was not a waiver once for all of the general covenant, but an election that the plaintiffs would not take advantage of it during the currency of the notice to repair; and, after the expiration of that notice, the plaintiffs had the right to re-enter if the premises continued out of repair. The same may be said of the covenant to repair according to notice. Default in complying with the notice gave the right of re-entry after the expiration of the time limited by the notice. The notice was sufficient under sec. 13 of the Landlord and Tenant's Act, giving all the information required; and no subsequent notice was, in my opinion, necessary.

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The premises being admittedly out of repair, the right of re-entry was complete, and the plaintiffs are entitled to succeed upon their cross-appeal.

Relief may be granted to the defendants' prayer under sub-sec. 2 of sec. 13; and the only appropriate relief, in my view, is the restoration of the wall within a reasonable time. Three months, I think, is a reasonable time, and that may be extended from the date of this judgment. Aside from the question of forfeiture, the taking down of the wall, under the circumstances, was, in my opinion, waste, the appropriate remedy for which was the restoration of the wall within the time limited by the trial Judge.

The costs below should be allowed between party and party; the time for completing the repairs to be extended to three months from the date of this judgment. With this variation of the judgment below, the plaintiffs' appeal is allowed with costs, and the defendants' appeal dismissed with costs.

MIDDLETON, J.:—It is desirable to state accurately and at some length the exact contention made by the defendants' counsel before dealing with the cases. His contention may, I think, be put thus: The lease contains two covenants: a covenant to repair, and a covenant to repair on three months' notice. On a breach of either, the landlord has the right to forfeit. No action can be brought to enforce a forfeiture unless and until the notice required by the statute is given. This notice must be given after the breach which brings about the forfeiture. Assuming that what is alleged is a breach of the covenant to repair, the landlords had two courses open. They might treat the breach of the covenant as working a forfeiture, and give the notice required by the statute, so that they might re-enter by virtue of the forfeiture; or they might elect to waive the forfeiture and to continue the tenancy. By giving the notice under the covenant to repair according to notice, the landlords, it is said, have adopted the latter course, and cannot be heard to say that the term which they have, by the giving of that notice, elected to treat as existing, was forfeited and ended by the prior breach of the covenant to repair.

This does not mean that the landlords are without remedy. They could, before the statute, after the three months, bring ejectment either on the breach of the covenant to repair according to notice or by reason of the continuing breach of the covenant to repair, and, since the statute, upon the terms prescribed by the statute, *i.e.*, upon reasonable notice of intention to forfeit, they may avail themselves of any forfeiture which has taken place since the waiver of the particular forfeiture by the notice in question.

The plaintiffs contend that the notice which was given can be regarded as a notice under the statute as well as under the covenant. It is said that a moment's consideration will shew that this cannot be, because the notice under the statute is an election to forfeit, and the notice under the covenant is an election to waive the forfeiture. A notice may be so vague and ambiguous that it may be difficult to ascertain the landlord's real intention; but no notice can be supposed to express these two opposite and conflicting ideas. When the notice is ambiguous, it must be construed against the landlord who gave it, and the tenant is entitled to regard it as a notice under the covenant if it is capable of being so construed. No one reading the notice here given can doubt that it is an apt notice under the covenant, and it must be so treated; and it is not important that possibly the notice might have answered as a notice under the statute, if there had been no second covenant in the lease, and so no ambiguity.

This is a fair summary of Mr. Armour's very able argument upon that branch of the case.

Turning then to what has been decided. In *Doe dem. Morecraft v. Meux*, 4 B. & C. 606, an action was brought after the giving of notice and before the expiry of the three months. Bayley, J., said: "The landlord in this case had an option to proceed on either covenant, and after giving notice to repair within three months, he might have brought an action against the defendant upon the former covenant for not keeping the premises in repair. But that is very different from insisting upon the forfeiture. It is said that, the premises being out of repair on the 6th August, when the notice was given, the lease was thereby forfeited. But the landlord has affirmed that the lease subsisted up to the 29th September, by receiving the rent which became due at that period.

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It is plain, therefore, that he did not intend to insist upon an immediate forfeiture at the time when the notice was given, and I think that notice amounted to a declaration that he should be satisfied if the premises were repaired within three months, and that he thereby precluded himself from bringing an ejectment before the expiration of that period." Holroyd, J., said: "It appears to me that the notice requiring the tenant to repair within three months was equivalent to an admission that the tenancy would continue up to the expiration of that time. If it did not operate as a waiver of the forfeiture incurred by breach of the covenant to keep the premises in repair, the landlord might be able to bring ejectment after the tenant had put the premises in repair pursuant to the notice; which would be extremely unjust. But I think that although the action for breach of the covenant would remain, yet the forfeiture was waived."

In addition to what I have quoted, the earlier case of *Roe dem. Goatly v. Paine*, 2 Camp. 520, is distinguished upon the ground that the notice given was a notice to repair forthwith. And in *Few v. Perkins*, L.R. 2 Ex. 92, a somewhat similar notice is regarded in the same way. The notice was vague and general, and was not an election of the landlord to waive the forfeiture, because there could not be found in it anything necessarily referable to the latter covenant or making it anything more than "the usual, though not necessary, course of giving the tenant notice to repair," given as a matter of courtesy before bringing ejectment.

In *Doe dem. de Rutzen v. Lewis*, 5 A. & E. 277, the covenants were slightly different, but the principle is the same. Denman, C.J., says: "The non-repair was proved; but the original lessor had reserved to himself a particular remedy, in case of non-repair . . . If the reversioner takes upon himself to repair, under a proviso like this, he waives the forfeiture for breach of condition. . . . The lessors of the plaintiff, by giving the notice of November . . . took into their own hands a remedy inconsistent with a right to insist on a forfeiture." Littledale, J.: "By giving notice under this latter proviso, the lessors of the plaintiff have waived their right of proceeding under the general power." Patteson, J., accepts the judgment of Holroyd, J., in *Doe dem. Morecraft v. Meux* as establishing that "the party, by proceeding on the special proviso, waives his right to proceed on the general



one," and refuses to regard *Roe dem. Goatly v. Paine* as authority to establish that "such provisoes as these are independent, so that ejectment may be maintained on one, though recourse has been had to the other;" for the very reason above indicated, that the notice was not in that case sufficiently definite to enable it to be said that recourse had been had to the other.

So far Mr. Armour's argument is borne out by the cases. The fallacy comes when he deals with the statute. The statute does not require that the notice should be given after the right of re-entry has arisen. It must be given after the act or neglect upon which the right to re-enter arises, but it may be given before the forfeiture takes place.

The covenant to repair is a continuing covenant, and each day that there is a state of non-repair, constituting a breach of the covenant, there is a right of entry and a right to forfeit the lease.

Assuming that on the 16th July, 1909, there was a breach of the covenant to repair, and that the notice then given was a waiver of the forfeiture that had then taken place, and, by reason of the recognition of the existence of the term for three months, precluded the landlords from acting on any breach of the covenant to repair during the three months, it does not preclude them from acting upon the subsequent breaches and on the right of entry arising from day to day during the period that elapsed from the expiry of the three months to the bringing of the action.

Then does the statute preclude the landlords from bringing the action without a new notice? I think not. We must be on our guard against reading into a statute more than it contains. What it requires is that before the landlord asserts the forfeiture he shall have given notice, not of his intention to forfeit, as is argued, but of his desire to have the covenant lived up to, drawing attention to the particular thing which the tenant has done or left undone. The notice does not need to be an election, but is to serve as a warning to the tenant so as to prevent him being taken by surprise.

This construction of the Act was adopted in the Court of Appeal in *Penton v. Barnett*, [1898] 1 Q.B. 276. There a notice was given under the Act. Then rent was demanded down to a period long subsequent to the notice, and any forfeiture was waived. The non-repair continued; and it was said that a new forfeiture took place because the covenant was continuing, and

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there was a new breach every day. This case also determined that the statute, though requiring a notice of the "particular breach complained of," did not require a notice of the "breach" in the legal significance of that term, but of the physical condition of the premises which the tenant was required to make good; and it also determined, in the third place, that such a notice might be well given before the "breach," in the legal sense upon which the right to forfeit and re-enter is based.

The question then resolves itself into the narrower one, was what was done a breach of the covenant?

The Crown leased to Jamieson on the 27th June, 1899, a vacant lot at the corner of Queen and Yonge streets, "together with a wall eighteen inches thick," described in a deed of the 19th July, 1867, "as projecting nine inches upon the next adjoining land to the north," "and the right and liberty to maintain, continue, use, build, and rebuild such wall as granted to the Board of Agriculture for Upper Canada by virtue of the provisions of the deed."

The deed of the 19th July, 1867, referred to, is one by which McIntosh, the owner of the lands in question and the lands to the north, conveyed to the Board the lands in question, "with the right and liberty to maintain and continue the wall of the building erected by the Board," "as it now projects, and hereafter from time to time to build the wall of any building which hereafter may be built by" the Board, "their successors or assigns, projecting nine inches upon the next adjoining land," to the intent that the wall may be used as a party wall.

In the lease Jamieson covenants to erect a building costing \$25,000 in accordance with plans to be approved by the lessor.

The building actually erected cost very much more than this. The north wall consists of the old party wall and an extension upward. The wall had not sufficient strength to carry the floors of the building, so that a steel structure was adopted; and the only function of the wall is that of a partition between the southern building and the building to the north.

There is a right of renewal for a certain time; and on the termination of the term the landlord is to pay the tenant the actual value of the building at the time the lease terminates.

The present tenants having acquired a lease of the building to the north, with the consent of the landlord of that building, have

removed part of the wall, so as to enable the ground floor to be used as one store. This does no real harm to the plaintiffs, in view of the long lease (105 years) and the fact that the building is the tenants' and is to be paid for on the footing of its actual value.

The wall in question is not the tenants,' but the amount that its restoration will cost is very small when compared with the value of the rest of the building.

If the covenant prevents its removal, then the plaintiffs have the right to assert the covenant, even though the advantage to them bears no comparison to the injury to the defendants. The familiar case found in *Æsop* does not indicate that the Court can refuse to interfere upon this ground.

Mr. Armour's contention is, that the act complained of here does not come within the covenant. The covenant is aimed at permissive waste. The act done is voluntary waste, and the remedy is in damages only.

This contention is supported by *Doe dem. Dalton v. Jones*,<sup>4</sup> 4 B. & Ad. 126. (See also report in 2 L.J. N.S. Q.B. 11.) There a dwelling was turned into a store. A window was enlarged and a door in an inside partition was closed and another door opened. This was found to be no breach of the covenant to repair, "the effect of which was merely that the tenant should supply the ordinary wear and tear of the premises."

*Holderness v. Lang*, 11 O.R. 1, deals with the same question; and I must confess that a careful perusal of it leaves my mind in much confusion as to what was really decided. The covenants in the lease contemplate the erection of buildings and the making of changes by the tenant. The \$25,000 building to be erected at the beginning of the term (lasting, including renewals, 105 years) would not remain suitable for all purposes throughout the term without alteration. The extended covenant to repair calls upon the tenant to "well and sufficiently repair, maintain, amend, and keep" the demised premises. The covenant in *Doe dem. Dalton v. Jones* was to "repair and keep repaired." Armour, J., in *Holderness v. Lang* (11 O.R. at p. 10) was "inclined to think what was done by the defendant was not a breach of his covenant" there, which was the same as that here; and in appeal Wilson, C.J., says, "I am inclined to think the lease before us is sub-

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stantially like the lease just referred to." Neither Judge places his decision upon this ground.

Bearing in mind that what was demised was the wall and not the building, and that here the covenant is to "maintain, amend, and keep" it, I cannot agree that this lease is substantially the same as the lease in *Doe dem. Dalton v. Jones*. And it seems to me that the removal and destruction of the party wall is a breach of the covenant to "maintain" it.

*Doe dem. Vickery v. Jackson*, 2 Stark. 293, is in point, and is cited with approval in all text-books.

I notice that in *Holderness v. Lang* it is said that the covenant is not a continuing covenant, and that the breach once made and waived cannot be relied on. This is in conflict with the weighty cases before quoted in dealing with this question.

As regards the contention made by the plaintiffs that restitution ought to be ordered, in specific performance of the covenant to repair, I am quite unable to assent. Platt (Covenants) p. 293, states: "The rule may now be taken to be established that equity will not decree specific performance of a covenant to repair, but will leave the party to recover damages in an action at law." This rule, so far as I can ascertain, has never been broken in upon, and applies also to waste. I mention this, that my position may be clear; but, as my judgment does not turn upon this, I do not discuss the cases.

There being, therefore, a breach of the covenant, and forfeiture, I agree with the terms suggested by my brother Clute upon which the defendants may be relieved.

I also agree that there was not power to order payment of solicitor and client costs, save as the price of indulgence, and that they should not be so awarded in this case.

Since the above was written, I have had my attention called to *Rose v. Spicer*, [1911] 2 K.B. 234, which is much in point.

LATCHFORD, J.:—I concur.

*Judgment below affirmed, with a variation.*

## [IN THE COURT OF APPEAL.]

## RE RISPIN.

*Will—Construction—Trust Fund for Benefit of Son—Sole Discretion of Trustee—Death of Beneficiary—Intestacy as to Portion of Fund not Disposed of—Date of Ascertainment of Next of Kin.*

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The testator devised his real estate and bequeathed his chattels to his son; and, after payment of his debts and funeral expenses, gave the rest of his cash and securities in bank or in his possession in trust to his executor, "and I authorise and request him to pay the interest . . . and the principal in whole or in part to my son . . . as in the judgment of my executor may be prudent with reference to the habits and conduct of my son my will and intention being that it shall be wholly in the discretion of my said executor to pay the interest and principal in such amounts and at such times as he may think right or to withhold the payment altogether." The executor received the bequest, and out of it paid certain sums to the son, who lived for fifteen years after the testator's death. At the death of the son a considerable sum remained, which was claimed by the executors of the son and by the next of kin of the father:—

*Held*, that there was an intestacy as to this sum; and the next of kin, ascertained as at the date of the death of the father, were entitled.

Review of the authorities.

*Gude v. Worthington* (1849), 3 DeG. & Sm. 389, considered and distinguished.

Judgment of *Boyd, C.*, affirmed.

MOTION by the executor of the will of Richard Rispin, deceased, for an order, under Con. Rule 938, determining certain questions arising upon the will as to the disposition of the estate.

April 8, 1911. The motion was heard by *Boyd, C.*, in the Weekly Court at London.

*F. P. Betts*, K.C., for the executor.

*John Macpherson*, for the executors of Luke Rispin.

*W. R. Meredith*, for the Official Guardian.

May 3, 1911. *Boyd, C.*:—Will made 10th July, 1893, by which testator gave to his son all his real estate and all the goods, chattels, and live stock now in his possession. After payment of all debts and funeral expenses, the rest of his cash and securities he gives to his executor—"And I authorise and request him to pay the interest in whole or in part to my son Luke Rispin and the principal in whole or in part to my son Luke Rispin as in the judgment of my executor may be prudent with reference to the habits and conduct of my son my will and intention being that it shall be wholly in the discretion of my said executor to pay the

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interest and principal in such amounts and at such times as he may think right or to withhold the payment altogether."

The testator died in September, 1895; the son received various payments from the executor, and died in November, 1910, leaving a will in which he assumed to dispose of the estate in the hands of the executor, amounting to about \$15,000. The executor disclaims all interest beneficially, and asks to whom the fund should be paid—under the will of the son, or to the next of kin of the testator as an undisposed of residue?

In *Gude v. Worthington* (1849), 3 DeG. & Sm. 389, the fund was set apart upon very much the same trusts as are found in this case, for the benefit of Mary Ann Seaman during her life, and, should there be any of the fund at her death undisposed of, upon trust for other persons. In this case there is no gift over, and the trustee is living, and the beneficiary is dead. In *Gude v. Worthington*, the trustees were dead and the beneficiary was alive, and it was held by the Vice-Chancellor, Knight Bruce, that Mary Ann Seaman was absolutely entitled to the whole fund. It was contended that the discretionary power given by the will was at an end with the death of the trustees, being of a personal nature. The Court gave no reasons, but intimated that it was to be taken that the discretionary power had been waived or had been declined to be exercised, and in either view the result was the same, *i.e.*, as I understand, that the primary intention of the testator was to benefit the person named, and that the death of the trustees, without having disposed of the fund for her benefit, was not to frustrate the manifest wish of the testator.

This decision has not been received with favour and has received various explanations, and it is certainly one that has gone to the verge of the law—particularly where the testator had made a gift over of the undisposed of residue. It has been spoken of by Stuart, V.-C., in *Rose v. Rowe* (1869), 21 L.T.R. 349, as a very remarkable decision and one which was not very elaborately argued.

Upon the language of this will, it is plain that the testator gave no property in this fund to his son, but only a direction to the executor to apply such part as he thought fit for the benefit of the son. Now, at the death of the testator, or at any other time,

had the son a right to call upon the executor to pay him anything out of the fund? Manifestly, no. The whole benefit was contingent on the *bond fide* judgment and volition of the executor. The son had no interest in the fund to assign or to deal with by testamentary gift. See *The Queen v. Judge of County Court of Lincolnshire* (1887), 20 Q.B.D. 167, which was followed in the case of a will like this in *Re McInnes v. McGaw* (1898), 30 O.R. 38.

Chitty, J., comments on *Gude v. Worthington* in *In re Stanger* (1891), 60 L.J.N.S. Ch. 326, and says that it proceeded upon the construction that the beneficiary took under the earlier part of the will an absolute interest with a subsequent discretionary power in the trustees which they had either waived or declined to exercise. I cannot read this will as shewing that the fund or any part of it was to pass to the son unless as a consequence of the action of the executor so to dispose of it.

The effect of *Gude v. Worthington* is somewhat considered in Sweet's edition of Jarman on Wills, 6th ed., vol. 1, p. 887: the trustees had paid part of the fund to the beneficiary, and died without any other exercise of their powers. The Vice-Chancellor held that the living beneficiary was entitled to the whole fund, but directed a reference to approve of a settlement (the beneficiary having married), "from which it would appear" (says the author) "that the Court undertook to exercise the discretion given to the trustees." But (he adds) "if the beneficiary had died before the trustees, it seems clear that her representatives would have had no claim to the fund." That is in truth the present case: the beneficiary dead, and the trustee having during the life exercised his powers only as to the payment of certain amounts, and now having in his hands the undisposed of surplus now in question.

To the present will I think the true rule of decision is suggested by Lord Thurlow in *Lewis v. Lewis* (1785), 1 Cox Eq. 162. This is not the case of a gift by the testator, but a power to others to give, and that confined to answer a particular purpose. Here the particular purpose has been fully answered by the provision made by the trustee during the life of the testator's son; and what remains at his death does not belong to his estate, but to that of the father.

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The subject was discussed by Romilly, M.R., in *Cowper v. Mantell* (1856), 22 Beav. 231, 233, who marks the distinction between the cases where a legacy is given to a person for a particular purpose, which fails, and yet he has been held entitled to the legacy, and those in which there is no gift of a legacy, but only a discretion is confided in trustees, which not having been exercised, the possible legacy fails altogether. The case before him was one in which the testator authorised his trustees to apply any sum not exceeding £600 in the purchase of a church preferment for A. A. died before any sum had been so applied, and it was held that the gift wholly failed. The reasons in the last words (at p. 237) apply to the case in hand: "I am of opinion that A. could not himself have acquired payment of the sum of money, and therefore, that it falls into the residue."

I do not think that *Gude v. Worthington* should be extended, and I prefer to adopt as correct and applicable to this will the dictum of a master of equity, Stirling, J., in *In re Johnston*, [1894] 3 Ch. 204. A sum was there given absolutely, but coupled with a direction that the trustees in whom it was vested should so deal with and husband it as to prevent it falling into unworthy hands. The like provision is contained in this will, just as it was in the will under consideration in *Bain v. Mearns* (1878), 25 Gr. 450. Stirling, J., held that the condition was repugnant to the gift, and then proceeded to point out that "the testator might (if he had been well advised) have effectually provided for the same object by making the gifts entirely dependent upon the discretion of the trustee. For example, he might have given to the legatees such sums only as the trustee, in the absolute exercise of his discretion, thought ought to be given to them. That would be one way. Another mode of effectually doing it would have been to make in some shape or form a gift over, so as to benefit other persons besides the sons," etc.

This will is drawn with apt words to carry out the first method pointed out by Stirling, J., and in this respect the testator was well advised. *Re Eddowes* (1861), 1 Dr. & Sm. 395, supports the conclusion that there is an intestacy as to the undisposed-of part of the fund in the hands of the executor.

My conclusion is, that the undisposed of residue in the hands of the executor should be paid into Court for the benefit of the



next of kin of the testator, and that it be referred to the Master at London to ascertain who they are and to distribute the fund accordingly. The executor to pass his accounts and receive his costs and commission and be discharged.

Costs of this application out of the estate.

The solicitor appointed to represent the unascertained next of kin to have the carriage of the matter in the Master's office.

By order of Moss, C.J.O., of the 12th May, 1911, the executors of Luke Rispin were allowed to appeal from the judgment of the Chancellor directly to the Court of Appeal.

November 24 and 27, 1911. The appeal was heard by Moss, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, J.J.A.

C. A. Moss, for the appellants, argued that the primary object of the testator, Richard Rispin, was to benefit Luke Rispin, his son, and the discretion given to the executor was for the purpose merely of regulating the mode of enjoyment by the legatee. The case is similar to *Gude v. Worthington*, 3 DeG. & Sm. 389, and that authority should be followed in the case at bar. Reference was also made to *Gough v. Bull* (1847), 16 Sim. 45; *Hancock v. Watson*, [1902] A.C. 14; Theobald on Wills, 7th ed., p. 495, and cases there cited; *Presant v. Goodwin* (1860), 29 L.J. P. & M. 115; *In re Coleman* (1888), 39 Ch.D. 443; *Younghusband v. Gisborne* (1844), 1 Coll. 400; *Kearsley v. Woodcock* (1843), 3 Hare 185; *Green v. Spicer* (1830), 1 R. & M. 395; *Rippon v. Norton* (1839), 2 Beav. 63; *Lewes v. Lewes* (1848), 16 Sim. 266. *Lewis v. Lewis*, 1 Cox Eq. 162, cited by the Chancellor and in the reasons against appeal, is distinguishable.

F. P. Betts, K.C., for the executor of Richard Rispin, submitted the rights and interests of his client to the direction of the Court, as he was not a contentious party to the proceedings. He referred to Williams on Executors, 10th ed., p. 884, as to the determination of the next of kin, in case the Court found that there had been an intestacy.

W. R. Meredith, for the Official Guardian, argued that the judgment of the learned Chancellor was right and should not be disturbed. The words of the will itself shewed that there was no direct gift to Luke, and the gift to the executor was one under which he had full discretion, both as to principal and interest,

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whether he should give or withhold the benefit. All the cases cited on behalf of the appellants, with the exception of the *Gude* case, are cases where there was no power of withholding the benefit. He referred to *Re Skinner's Trusts* (1860), 1 J. & H. 102; *Re Eddowes*, 1 Dr. & Sm. 395; *In re Stanger*, 60 L.J.N.S. Ch. 326. The *Stanger* case is a very strong one for the respondents, and discusses the *Gude* and *Gough* cases, which are relied on by the appellants. The *Gude* case is essentially different from the present one, as there the trustees were dead, and the prospective beneficiary was living. No new trustee could be appointed to carry out the trust, and it was held that the beneficiary could not be deprived of his rights by reason of the death of the trustee. Reference was also made to *In re Murphy's Trusts*, [1900] 1 I.R. 145; Lewin on Trusts, 12th ed., p. 1075; *In re Johnston*, [1894] 3 Ch. 204; *In re Miller*, [1897] 1 I.R. 290.

Moss, in reply, referred to Jarman on Wills, 6th ed., pp. 885, 888, where the *Johnston* and *Miller* cases are cited, and argued that the cases cited on behalf of the respondents were distinguishable from this case at bar. The respondents have to read the word "pay" in the will as "give," but the will speaks of payment all the way through—a distinction on which the *Eddowes* case depended. In *In re Murphy's Trusts* there was a gift over, and *Re McInnes v. McGaw*, 30 O.R. 38, cited in the Chancellor's judgment, was a case dealing with income only.

February 22, 1912. Moss, C.J.O.:—The question submitted for solution in this appeal is, whether, upon the true construction of the 4th clause of the will of the late Richard Rispin, the cash and securities therein designated were so disposed of as that, upon the testator's death, they became the property of his son Luke Rispin, so that his personal representatives are now entitled to them, or whether, as determined by the learned Chancellor, they are now subject to distribution among the next of kin of the testator as upon intestacy.

There is no direct gift to Luke Rispin of the property in question or any part of it. In terms it is given to the executor, in trust it is true, but not expressly to hold for Luke Rispin. If in the testamentary disposition in question a gift to Luke Rispin is to be found, it is only to be gathered from the whole clause. It contains words indicative, perhaps, of an idea in the mind of

the testator that his son's position was to be as owner with his right of complete enjoyment of it or its fruits controlled by the exercise of the prudent and discreet judgment of the executor, to be interposed if and when necessity required. The use by the testator of the expressions "pay" and "payment," contained in the authority and request to the trustee, which in the primary sense imply an antecedent obligation, instead of the word "give," which implies voluntary action, may be said to afford some indication of an intention that the property, though held by the trustee, was beneficially the property of the son.

But, in view of the other language, it is scarcely to be supposed that the testator was intending to use these words in their strictest sense, but simply as terms convenient to express the transfer of money. They are not the controlling words of the clause. Greater force is found in the injunctions laid upon the trustee and the declaration of the testator's will and intention that it was to be wholly in the discretion of the trustee to pay or withhold payment altogether of principal or interest.

The property was thus left wholly subject to the trustee's action, and whether Luke Rispin got any or all of it depended wholly upon the trustee. It is plain that the testator was very desirous of withholding from his son any control over the property and any right to demand or receive it or any part of it from the trustee except with his consent.

It was placed beyond the son's power to make any disposition of it which would take effect either during his lifetime or after his death. To have left it otherwise would have frustrated the testator's main design by enabling it to be assigned or pledged and the proceeds improperly spent.

The matter being entirely within the power and discretion of the trustee as regards what Luke Rispin should receive, only that which he received up to the time of his death became his or belonged to him. The remainder, being undisposed of in the hands of the trustee—who, of course, lays no claim to it on his own behalf—is, therefore, subject to distribution as upon intestacy.

There appears to be no question as to the date of the intestacy being as of the date of the testator's death.

There does not appear to be any good ground for further inquiry as to the oral directions said to have been given by the

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trustee to the manager of the loan company. The fact remains that the property never was received by or placed in the control of Luke Rispin, but continued in the possession and subject to the actions of the trustee.

The appeal fails and must be dismissed; but, under the circumstances, the costs of all parties may be properly borne by the estate—the trustee's costs as usual.

GARROW, J.A.:—Appeal by the plaintiffs from the judgment of the Chancellor upon the construction of the will of the late Richard Rispin.

Richard Rispin, market-gardener, of the city of London, Ontario, who died on the 20th September, 1895, made his will on the 10th June, 1893, whereby he appointed the respondent Davis to be his executor. His only near relations at the time of his death were his son, Luke Rispin, and a grandson, Charles Rowe, who had not been heard from for some years.

By the will, the testator's real estate and his goods, chattels, and live stock were devised and bequeathed to his son Luke Rispin. Then followed the bequest which gives cause for this application, which is as follows:—

"4. After the payment of all my debts and funeral expenses I give the rest of my cash and securities in bank or in my possession in trust to my executor the Reverend Evans Davis and I authorise and request him to pay the interest in whole or in part to my son Luke Rispin and the principal in whole or in part to my son Luke Rispin as in the judgment of my executor may be prudent with reference to the habits and conduct of my son my will and intention being that it shall be wholly in the discretion of my said executor to pay the interest and principal in such amounts and at such times as he may think right or to withhold the payment altogether and I appoint the said Reverend Evans Davis to be executor of this my will. In testimony whereof I have hereunto set my hand this tenth day of July, 1893."

Luke Rispin died on the 2nd November, 1910, having also made his will, whereby he appointed the appellants to be his executors.

The respondent Davis received the bequest, and out of it paid certain sums, the amounts of which are of no consequence, to

Luke Rispin in his lifetime; but at his death a considerable sum, some \$14,600, remained, and the question is as to the proper disposition of this sum.

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The learned Chancellor was of the opinion that, under the bequest, Luke Rispin took nothing but what the respondent Davis as trustee chose to give; and that, consequently, as to what remained at Luke Rispin's death, there was an intestacy on the part of Richard Rispin.

I agree with the conclusion of the learned Chancellor, and would have been content simply to assent without more, but for the earnestness with which the case for the appellants was presented to us by counsel, and the number of cases which were cited in support of his contention.

The question is, of course, simply one of construction, and therefore depends upon a proper consideration of the exact language used.

The testator's good intention towards his son, although apparent, is not alone sufficient. There must be found in the language either an express or at least an implied gift of the property in question; otherwise there is no will as to it, and it must pass as the law directs in the case of intestacy.

The cases bearing upon similar questions arising under other wills are numerous, and one might even say sometimes embarrassing, if not conflicting. Several of them are referred to by the learned Chancellor. But no case is, after all, particularly useful, unless, as seldom happens, it arose upon similar language and under similar circumstances, or has laid down some general principle of construction applicable to all such questions.

Instances of the former class are, *In re Stanger*, 60 L.J. N.S. Ch. 326, and *Bain v. Mearns*, 25 Gr. 450.

And of the latter, I refer to *Lassence v. Tierney* (1849), 1 Macn. & G. 551, where Lord Cottenham said: "If a testator leave a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee,—upon failure of such objects, the absolute gift prevails; but if there be no absolute gift as between the legatee and the estate, but particular modes of enjoyment are prescribed, and those modes of enjoyment fail, the legacy forms part of the testator's estate, as not having in such event been

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given away from it. . . . In every case, therefore, the question must be one of construction; and, except for the purposes of such construction, very little assistance can be derived from former decisions. It is, however, obvious that the intention that the gift should be absolute as between the legatee and the estate, is, as in all cases of construction, to be collected from the whole of the will, and not from there being words which, standing alone, would constitute an absolute gift."

In *In re Johnston*, [1894] 3 Ch. 204; referred to in the judgment of the learned Chancellor, there were what were held to be gifts to the sons, which makes all the difference, for, if once the conclusion is arrived at that there is a gift, the Court will enforce the trust.

The circumstance that here the property is expressly given to the defendant "in trust" is not, I think, of controlling importance, having regard to the whole language of the bequest, which must of course be looked at.

In *Eaton v. Watts* (1867), L.R. 4 Eq. 151, the testatrix had given her property to her husband, "hoping he will leave it after his death to my son . . . if he is worthy of it . . ." The testatrix then explained her reasons for leaving the property in the entire power of her husband, namely, that the son was already certain of a handsome fortune independent of his father, and that she could not then feel certain what sort of character he might become, and therefore left it to the husband, "in whose honour, justice, and parental affection I have the fullest confidence." She then provided for the case which actually occurred, of the son predeceasing the father, by repeating that she left the property to her dear husband "to dispose of it as he thinks fit, yet should my son leave any children, I do not doubt it will go to them from him, knowing his steady principles, and clear judgment of right and wrong, and his sense of justice." Vice-Chancellor Stuart held that no trust was created in favour of the son, saying: "The words of confidence are weaker than in most of the cases, while the expressions giving control to the object of the gift are extremely strong, so strong that, in my opinion, they bring this case within the observation of Lord Alvanley, that the subject of the gift was placed so completely in the power of the object of the gift, as that the testator left to him the option to defeat the wish or hope expressed."

The reference to Lord Alvaney's observation is to his judgment in *Malim v. Keighley* (1794), 2 Ves. Jr. 333, where he says that "wherever any person gives property, and points out the object, the property, and the way in which it shall go, that does create a trust, unless he shews clearly, that his desire expressed is to be controlled by the party; and that he shall have an option to defeat it."

See also *Knight v. Boughton* (1844), 11 Cl. & F. 513.

These are, it is true, instances of precatory trusts; but a precatory trust, once established, is just like any other trust, and in the process of establishing such a trust, it is, I think, quite permissible to look at what prerequisites the authoritative cases have determined must exist. And one of the prerequisites is, that the existence of an option in the trustee will usually be fatal to the trust. See further *per* Lord Truro in *Briggs v. Penny* (1851), 3 Macn. & G. 546.

And for an instructive discussion by Romer, J., of the circumstances under which a power to appoint will be held to create a trust in favour of a class, see *In re Weekes Settlement*, [1897] 1 Ch. 289. There the alleged trust failed, because, although the testator's good intention was, as here, apparent, no gift had actually been made. And I may note that there was in that case the circumstance, so much relied on here, of no gift over, a circumstance always of importance if the language of the testator can be said to be doubtful, which cannot I think be said in this case.

For these reasons, as well as for those given by the learned Chancellor, I am of the opinion that his judgment should be affirmed and the appeal dismissed.

The intestacy, it is not disputed, as I understood counsel, is to be as of the date of the death of Richard Rispin.

The costs of all parties may, I think, come out of the fund.

MACLAREN, J.A., concurred.

MEREDITH, J.A.:—I agree with the learned Chancellor in his conclusion and in his reasoning.

If the gift in question were made *inter vivos*, it would hardly be contended that that part of the fund which remained at the death of the son would not be, beneficially, the property of the

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surviving father; and I can find nothing in the mere fact that the gift was by will, nor anything in the will itself, to alter the case. There is certainly nothing in the grammatical construction of the words in question which warrants, or supports, the contention that the whole fund passed to the son, with only a restraint upon his control over it during his lifetime. The word "withhold" in no sense implies any right in the son which might be withdrawn from him; on the contrary, it indicates an absence of any right in him, except to that which was not withheld—that which was paid to him; whilst the other bequests of the will—one to the son himself—shew plainly the character of the language the testator would have used if he had meant that which the appellants here contend for.

The leaning against an intestacy has no great weight in such a case as this, in view of the character of the statutory distribution of the estates of intestate persons in this Province—the statutory will, as it is sometimes called: the residue would go to the testator's children share and share alike.

Decisions in other cases are not very helpful in such a case as this: and no two cases are quite alike. We are not confronted, in this case, with the great difficulty which was involved in the case of *Gude v. Worthington*. That case cannot rule this case, much less can all that might be thought to flow logically from the decision in it. A great difficulty that would be met if, in this case, the appellants' contention were given effect to, is this: the very purpose of the father to prevent the son wasting any part of the testator's estate in dissipation or improvidence would be frustrated: if the son took a vested interest in the whole fund under the will, whatever might have been his exact rights as to possession of it, his powers of disposition over it would have been enough to frustrate his father's provident attempt to save it.

The additional evidence, sought to be adduced here, would not alter the case, even if taken most favourably for the appellants: there would be no payment, within the meaning of the will, beyond the sums actually received by the son.

I would dismiss the appeal.

MAGEE, J.A.:—I agree that the judgment appealed from should be affirmed, and for the reasons given. It is not necessary



to consider what would have been the rights of the testator's son Luke Rispin in case there were any withholding by the executor in bad faith, without having any reason in his own mind for doubting the propriety of paying the fund over on account of what the testator called "the habits and conduct of my son." No such case is made here; and, in the absence of such bad faith, it is clear that the son could not in his lifetime have compelled the payment over to him of any part of the fund. That being so, it seems to follow that the present case turns on whether the executor could, after the death of Luke Rispin, have exercised the discretion in his favour. It is not a trust for Luke Rispin and his executors, with power to withhold during Luke Rispin's life on account of his habits. The executors would only take because there was an absolute interest given to Luke Rispin or because a life interest was given him which at law would imply the absolute interest. But he took neither. There was a power to give him the fund held in trust for some person or persons. As was said in *Duke of Marlborough v. Lord Godolphin* (1750), 2 Ves. Sr. 61, "it would be absurd that powers of this kind should be executed for benefit of a person dead at the time of executing." If, then, the executor could not now exercise his discretion, he has not waived any right, or refused to exercise it by submitting the matter to the Court, so as to entitle the Court to do so.

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*Appeal dismissed*

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*Municipal Corporations—Erection of Bridge over Creek—Narrowing of Channel—Flooding Lands—Action Brought in High Court—Transference to Drainage Referee for Trial—Jurisdiction of Referee—No Question of Drainage Involved—9 Edw. VII. ch. 28, sec. 2—Municipal Drainage Act, 10 Edw. VII. ch. 90—Cause of Complaint—Time-limit for Making Claim—Improper Interference with Channel—Finding of Referee—Affirmance on Evidence—Damages—Depreciation in Selling Value of Land—Fear of Future Flooding.*

An action for damages for flooding the plaintiff's lands was begun on the 28th December, 1909, in the High Court. The action was set down for trial; and an order was made, by the Judge presiding at a sittings for the trial of actions, transferring the action for trial to the Drainage Referee. The order recited that it appeared that the action involved the question of drainage. It appeared, although not so stated on the face of the order, that the parties consented to it; and it was not moved against. The Referee tried the action, and determined it in favour of the plaintiff. Upon appeal from the judgment, the point was raised by the defendants that the Referee had no authority or jurisdiction to deal with the case under the order, because the case did not fall within the provisions of the Municipal Drainage Act, no question of drainage being involved, and the cause of complaint having arisen more than two years before the commencement of the action. The cause of the flooding was the erection by the defendants in 1907 of a bridge across a creek, which had the effect of narrowing its channel. The earliest flooding occurred on the 30th December, 1907, and the other floodings in the years 1908 and 1909:—

*Held*, that the cause of complaint was not the building of the bridge, but the damage occasioned by the subsequent floods, and that was within two years before the commencement of the action; and by the amendment to the Municipal Drainage Act, 9 Edw. VII. ch. 78, sec. 2, now sec. 99 of the Municipal Drainage Act, 10 Edw. VII. ch. 90, the Court or Judge is empowered to transfer an action, not only where it appears that the relief sought is properly the subject of proceedings under the Act, but where it appears that the action may be more conveniently tried before and disposed of by the Referee; and, therefore, the objection could not avail the defendants.

*McClure v. Township of Brooke* (1902), 5 O.L.R. 59, distinguished.

*Held*, also, that the finding of the Referee that there was an improper interference with the width of the channel of the creek, with the result that in times of freshet there was an interruption of the flow of the stream, which had the effect of flooding the plaintiff's lands, was in accordance with the great preponderance of the testimony, and should be affirmed.

*Held*, also, that the plaintiff was confined to such damage as properly and naturally resulted from each flooding; and the alleged depreciation in the selling value of the plaintiff's land, by reason of the fear of future flooding, was not comprised therein.

*West Leigh Colliery Co. v. Tunncliffe & Hampson Limited*, [1908] A.C. 27, 29, followed.

Judgment of the Referee varied by reducing the amount of damages allowed by him.

THIS was an action for damages for the flooding of the plain-

tiff's lands, begun in the High Court of Justice by writ of summons issued on the 28th December, 1909.

The action was set down for trial at Sandwich, and came before BOYD, C., who made an order on the 18th May, 1910, directing "that the matters in dispute between the parties be transferred for trial by the Referee appointed under the provisions of the Municipal Drainage Act, to be tried pursuant to the provisions of the said Act, and all proceedings herein may be had and taken as if the action had originally been brought under and by virtue of the said Act."

The referee (George F. Henderson, Esquire, K.C.) accordingly proceeded with the trial, and gave judgment on the 30th May, 1911, as follows:—

The plaintiff is the owner of a low-lying farm, situated between Cedar creek and Lake Erie, almost at a point where that creek finds its outlet into the lake. When he purchased the property, he found a considerable portion of it to be low-lying, swampy land, into which there ran a trend of water, which some of the witnesses have dignified by the term of creek, but which is hardly to be called such, known as Pike creek, and the swamp on the plaintiff's property being called Pike swamp. Being apparently a man of means as well as enterprise, he conceived the idea of reclaiming this land, and for that purpose constructed an embankment along the edge of Cedar creek and built a pumping station with a view to taking the water from the outlet of Pike creek by means of pumping, and thus discharge it into Cedar creek. This succeeded for the first year or so after the construction of the pump, but subsequently became of no use to the plaintiff because of another chain of events to which reference must be made.

Cedar creek is a stream of somewhat unusual size for a creek, and is the outlet for a large number of drainage schemes in the upper township, as well as for drainage in the township of Gosfield South. It is a natural watercourse in every sense of the term. For some time prior to the period of the plaintiff's ownership of the property, the highway crossing that stream to the east of his property, the stream being crossed by a bridge, belonged to the township. In 1891, that bridge was reconstructed, apparently under the control of a joint committee representing the county

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council as well as the township council; and the question arises as to which municipal body was responsible for its being where it now is. I find, on the evidence, that the bridge was constructed by the township council, although the county council supplied one-third of the cost of its construction, and probably, through its officers, had more or less to do with the details of the construction. As a matter of legal effect, it was a work of the township, not a work of the county. In any event, the liability was beyond question township liability. It replaced what was undeniably a township bridge and a township bridge alone; and, whoever may have owned it pending construction, it was at once taken over by the township as a township bridge, and the township was responsible for its continuance. This bridge, constructed in 1891, remained until 1907, when it was replaced by the structure with which the highway is crossed to-day. The opening of the present bridge is practically of the same size as that of 1891, but it is a more modern construction, and the absence of spiles give it a greater capacity, if otherwise unobstructed.

The 1891 bridge replaced a former bridge of a greater span, there being a difference, which the evidence does not with absolute accuracy determine, but approximately a difference of forty feet. The natural stream was at least one hundred feet in width at that point, and the span of the present bridge is somewhat less than seventy feet, the bridge being a cement and steel structure, and its abutments being built in the ordinary way.

There are differences in the width of the opening at water levels, depending upon the height of the water. The result of the construction of that bridge was materially to narrow the stream. It had in fact greater capacity than the bridge which was formerly there, that is, from an ordinary engineering point of view; and, had something else not happened, this trouble might not have arisen. In the year following its construction, however, and at the time of the spring freshet, the opening of the bridge became partially blocked by the accumulation of ice and debris brought down by the spring freshet, and the force of the water, which was held back by that blocking, broke through the bank of the creek, which happened to be a very short distance only from the water of the lake, at a point almost immediately

west of the bridge, and thus created a new outlet to the lake for the waters of the creek.

There is a highway running along that bank, the south-westerly bank, of the creek; and the township authorities, instead of at once filling up the opening made by this flood water, and in that way repairing the highway, thought proper to build a bridge over it and maintain the highway in that condition. That appears to have been a large opening; and, when the bridge over it was completed, it gave not only a larger opening for the waters of the creek but a shorter course to the lake than the original course, which was some little distance further down stream.

The bridge was maintained by the township authorities as a bridge for ten years, and during those ten years the bulk of the water coming down the creek took the more ready means of access to the lake under this newly constructed bridge; and, as incidental to that, the opening under the highway bridge, to which reference has first been made, became considerably lessened by the deposit of sediment brought down stream and checked in its course or flow partly by the abutment of the bridge and partly by the natural checking of the current of the water turning the corner.

At the end of the ten-year period, to which I have referred, the township authorities, for some reason which is not perhaps easy to understand, saw fit to take away the bridge and block up this place in the road which had been washed out ten years before. I say it is not easy to understand why they did that, because about that time they appear to have purchased land to build a new outlet for the creek on the easterly side of the main bridge. However, they did it, and apparently did it as a part of a scheme of reconstruction of the bridge, which had been built in 1891, and which again required reconstruction. I perhaps have not made it clear that the bridge as built in 1891 was somewhat of an old-fashioned structure, supported on piles, and that the bridge which replaced it in 1907, in the month of October, was the cement and steel bridge to which I have referred. Perhaps I was somewhat confusing in my early references to that. The result was, that in the month of October, 1907, conditions were entirely changed, and the waters coming down Cedar creek had no further outlet than that under the cement bridge, with the

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accumulated sediment to which reference has already been made. The evidence satisfies me that there never has been since the construction of the bridge in 1891 a free flow of water down Cedar creek or a free outlet for the water brought down Cedar creek except during the ten-year period, when there was an alternative outlet by means of the wash-out course.

In the latter part of the month of December, 1907, the plaintiff, for the first time, suffered a flood, which crossed over his bank and flooded a great portion of his farm. That was in the winter season, when apparently no appreciable damage resulted. In the following spring, 1908, he had two floods. Some question arises as to the character of these. There is a great deal of evidence; and, as is unfortunately only too customary in this class of case, there is an attempt to shew that the floods were, or some one of them was, of an extraordinary character; and, as again frequently happens in this class of case, witnesses are called to verify that position. While satisfied that there was an extraordinary flood, they do not agree as to just when that happened; none of them speak of more than one flood. The plaintiff was damaged by two floods; and, for that and other reasons, I am satisfied that there was nothing extraordinary, in the proper sense of the term, about either of the floods which caused him damage. The township authorities would not be responsible for any really extraordinary flooding within the proper meaning of that term, as it is defined by the Court of Appeal in *Coghlan v. City of Ottawa* (1876), 1 A.R. 54, which is the only case which occurs to me at the moment.

There is no pretence that other floods which happened in the following year, 1909, were extraordinary. The plaintiff suffered damage to his lands in each year; and the question is whether or not the defendants are responsible. I think Mr. Wilson is right in his position that the defendants had no right to obstruct the full flow of the natural stream. Unfortunately, the case has been argued on both sides without any citation of authorities.

I am arriving at a conclusion without having had the advantage of any personal search for authority. Either party must take the result of any failure that ensues. It appears to me that the defendants can be in no higher position than the ordinary riparian owner. They are not the owners of the fee, but they have

control of the highway for highway purposes; and I think it proper to assume that, for the purposes of this case, they have the rights of a riparian owner. As I understand the law, any riparian owner, whether up-stream or down-stream from his neighbour, has a right to protect himself against the common enemy, flood-water, whatever the result may be to his neighbour. Mr. Wigle had the right to erect the embankment which he did. It is not contended otherwise. I cannot understand any principle upon which the defendants had the right to place an obstruction in the bed of the stream so as to interfere with the flow of the water. The evidence satisfies me that the bridge did interfere with the flow of the water. If that bridge had not been there, the water would not have been held back so as to overflow the plaintiff's land. It is not contended that the defendants acquired a right to maintain a bridge by lapse of time, or upon any other legal principle that I can think of, or to which counsel has referred.

I assume that none of the work was done by by-law. The closing of the wash-out course was done without even a resolution of council; and, although the evidence is silent as to the authority for the building of the bridges in 1891 and 1907, the argument has proceeded on the assumption that there were no by-laws.

I am forced to the conclusion that the defendants have maintained a bridge which is an obstruction to the stream, because it narrows it and holds back water, and it is responsible for the consequences. If I am right in this, it becomes a question of assessment of damages. The plaintiff's damages are divisible into two parts, the first or more important part at the end, and I propose to deal with it first, that is, the depreciation in the market value of his property. He bought the land originally in partnership with a friend. Shortly before the commencement of this action, he entered into a contract, which has subsequently been carried out, to sell the property for \$14,000. It had cost him \$11,700. It may have been a good bargain or a bad bargain. After purchasing he had improved it by the construction of the dyke and pumping station, and probably otherwise. He certainly had done considerable ditching on it. The purchaser says that he bought it with full knowledge of the disability which attached to it, expecting that it might be overflowed from year to year, as

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it was overflowed in 1908 and 1909. He says that, if it had not been subject to that disability, he would have been willing to pay \$19,000 for it, instead of \$14,000. That, however, was never a practical question with him, and he gave that valuation to-day as a matter of opinion only. In other words, he puts the depreciation at \$5,000. The plaintiff himself puts it in as \$4,000. One witness called by the defendants says that there is no depreciation in value; but I attach no importance to his evidence: first, for the reason that he did not impress me as being the kind of a man who could give satisfactory evidence of valuation; and, beyond that, for the reason that it is rather absurd to say that there is no depreciation.

I viewed the land yesterday, and was somewhat surprised to find the plaintiff putting the depreciation at as high a figure as \$4,000. Counsel for the defendants asks me to use my knowledge obtained on the view, and takes the responsibility for my doing so. I do not find it necessary, however, to act upon that alone, as it is in evidence that, on the dissolution of the partnership between the plaintiff and his friend who was with him in the purchase of the property, the value was placed at \$16,000, and he paid his partner \$8,000 for the half interest. This was after the damage had occurred; and this incident is perhaps the best evidence of value. It agrees with my own impression; and, considering that evidence as well as my own impression, I think that the plaintiff is entitled to \$2,000 for depreciation.

Counsel have not overlooked the question as to whether it is a case for the allowance of permanent depreciation, in view of the fact that the present owner has purchased with knowledge of the disabilities attaching to the land.

The other branch of the damages is made up of a number of items which are detailed in the particulars filed; and, if my arithmetic is correct, amount to \$4,690. I do not propose to discuss these in detail. I have considered the different items carefully as they were given by the witnesses in evidence, and I am there again applying the knowledge, which I obtained on the view, so far as it is helpful; and on the whole I have taxed off the plaintiff's particulars of damages the sum of about \$1,500; and I conclude to treat the matter as a jury would treat it, and allow the plaintiff for damages in the two years the sum of \$3,000, that



is, within a very few dollars of the actual arithmetic as I arrived at it during the course of the hearing.

In the result, I find the plaintiff entitled to recover damages in the amount of \$5,000 with costs of the action.

The defendants appealed to the Court of Appeal from the judgment of the Referee; and the plaintiff cross-appealed, seeking to increase the damages.

December 7, 1911. The appeal and cross-appeal were heard by Moss, C.J.O., GARROW, MACLAREN, and MAGEE, J.J.A.

*J. H. Rodd*, for the defendants. The Referee, having found no question of drainage involved in the action, had no power to deal with the questions "pursuant to the provisions of the said Act" (the Municipal Drainage Act) as recited in the order of transfer, as the questions involved did not come within the purview of such provisions: *Northwood v. Township of Raleigh* (1882), 3 O.R. 347, at pp. 357 and 358; *McGillivray v. Township of Lochiel* (1904), 8 O.L.R. 446. In any event, the proceedings never became instituted under the Municipal Drainage Act until the making of the order of transfer, and no cause of damage existing more than two years prior to that date should have been considered: *Whitehouse v. Fellowes* (1861), 10 C.B.N.S. 765. Assuming that the Referee had jurisdiction, he erred in holding that the plaintiff had a right to complain of the shortening of the bridge in 1891, because he was not then the owner of the lands in question. The bridge then constructed was sufficient for the waters which came down, and it was not until the Corporation of Colchester South diverted into Cedar creek the waters from over 3,000 acres of their lands, that any inadequacy appeared, and the defendants are not responsible for the damages resulting: *Dickson v. Carnegie* (1882), 1 O.R. 110; *Law v. Town of Niagara Falls* (1884), 6 O.R. 467; *Brown v. Street* (1844), 1 U.C.R. 124; *Austin v. Snyder* (1861), 21 U.C.R. 299; *Dickson v. Burnham* (1868-70), 14 Gr. 594, 17 Gr. 261. The plaintiff constructed his pumping system while this was the only outlet, and he was not in any worse position after the closing of the accidental channel than he was before. The plaintiff had no right to this accidental outlet: *County of York v. Rolls* (1900), 27 A.R. 72. If he suffered any permanent depreciation in the value of the lands by this closing,

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an equal enhancement in value was made by the breach, and to this enhancement he was not entitled. No damages whatever, therefore, should have been allowed for depreciation; nor should he be allowed for prospective damages: *West Leigh Colliery Co. v. Tunncliffe & Hampson Limited*, [1908] A.C. 27; *Young v. Grand River Navigation Co.* (1856), 13 U.C.R. 506, at p. 507. By the breach, the waters of Cedar creek were diverted over his neighbour's land, and it was the duty of the defendants to close up the opening; and the bridge constructed was intended to be only a temporary way. Unless the plaintiff shewed negligence in construction he could not succeed: *Patterson v. Township of Peterborough* (1869), 28 U.C.R. 505; *Langstaff v. McRae* (1892), 22 O.R. 78. In any event, the closing was done in September, 1907, and the action was not begun for more than two years after the damage was done: *Bureau v. Gale* (1911), 44 S.C.R. 305. The damages allowed are excessive.

*M. Wilson*, K.C., for the plaintiff. The defendants cannot now question the jurisdiction, because the Court had jurisdiction to make the transfer under sec. 99 of the Drainage Act, and because the defendants are estopped from objecting to the proceedings by their consent and request, as appears by their solicitors' letters. Besides, the defendants accepted and acquiesced in the order as issued, and acted thereon. The defendants could not delay the trial of an action until the lapse of two years from the time of the damage, and then object to the jurisdiction of the Referee because of the lapse of such two years before the order of reference. On the contrary, the action having been brought within the two years, sec. 99, sub-sec. (2), applies. The plaintiff, however, does not admit that he is bound by the limitation of two years. The plaintiff is entitled to damages against the defendants, for the reasons given by the learned Referee: *Coghlan v. City of Ottawa*, 1 A.R. 54. The defendants had a remedy against the upper municipality: 10 Edw. VII. ch. 90, sec. 3, sub-sec. 3 (O.); *Sutherland-Innes Co. v. Township of Romney* (1899), 26 A.R. 495; S.C. (1900), 30 S.C.R. 495. The plaintiff was entitled to have the free and full flow of Cedar creek, or such a substitute as would give a like advantage or protection to the plaintiff's land. There was no reasonable evidence upon which it could be found that the damage in question would have

arisen from the act of the Corporation of Colchester South, if the defendants had left the creek unobstructed by the bridge. Moreover, the bridges and obstructions were placed by the defendants in Cedar creek, and the defendants filled up the relief outlet, all after the alleged drainage in Colchester. See *In re Townships of Orford and Howard* (1891), 18 A.R. 496. The damage was occasioned by reason of a wrongful permanent obstruction made by the defendants in Cedar creek. The plaintiff is entitled to a greater sum for damages for the permanent injury to his farm than that allowed by the Referee.

*Rodd*, in reply.

February 22, 1912. Moss, C.J.O.:—This is really quite a simple case, and, as viewed in the light of the evidence as developed before the Drainage Referee, might very well have been tried and disposed of at the non-jury sittings. But the parties appear to have formed and acted upon the view that it was a case proper to refer to the Drainage Referee, by whom it was fully tried; and this is an appeal by the defendants and cross-appeal by the plaintiff from his judgment. An objection was made, at this late stage of the case, to the authority or jurisdiction of the Referee to deal with the case under the order, because, it was said, the case did not fall within the provisions of the Municipal Drainage Act, for two reasons, one being that a question of drainage was not involved; the other being that the cause of complaint arose more than two years before the commencement of the action.

The damages in respect of which the plaintiff brought his action arose from flooding his land, the earliest having occurred on the 30th December, 1907, and the others in the years 1908 and 1909. The action was commenced on the 28th December, 1909. The cause of the flooding was the erection by the defendants in 1907 of a bridge across Cedar creek, which had the effect of narrowing its channel.

From the nature of the case it is apparent that the cause of complaint here is not the building of the bridge but the damage occasioned by the subsequent floods. In other words, the cause of action is the damage, and the plaintiff could not have instituted an action seeking damage until he had suffered some. Probably he could, while still owning the land, have applied for and obtained

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an injunction; but he did not seek this remedy; and his only claim is and must be for the damage fairly and reasonably attributable to the floodings which took place before he commenced this action. And the cause of complaint in respect of these damages did not arise until within two years before the issue of the writ: *Whitehouse v. Fellowes*, 10 C.B. N.S. 765. That being so, an answer to both grounds of objection to the Referee's authority is supplied by the amendment to the Municipal Drainage Act, 9 Edw. VII. ch. 78, sec. 2, now sec. 99 of the Municipal Drainage Act, 10 Edw. VII. ch. 90, which empowers the Court or Judge to transfer an action, not only where it appears that the relief sought therein is properly the subject of proceedings under the Act, but where it appears that it may be more conveniently tried before and disposed of by the Referee. It never could have been intended that, because the reason given in the order of transference afterwards turned out not to be the best reason, all that took place after the making of the order should be set aside and treated as nugatory.

Upon the evidence before him, the Referee concluded that there was an improper interference with the width of the channel of Cedar creek, the result being that in times of freshet there was an interruption of the flow of the stream, which had the effect of flooding the plaintiff's lands. This finding is in accordance with the great preponderance of the testimony.

The question is thus reduced to one of the extent to which the plaintiff suffered damages for which he ought to be compensated in this action. Having parted with the land, he has now no right of action to restrain the continuance of the obstruction of the stream. Nor can he suffer damage by reason of any subsequent flooding.

One item of his claim is for depreciation in the selling value of the land by reason, as it is said, of the fear of future flooding, and the prejudice against the continuance of such a state of affairs. The plaintiff did not, as he might have while still owner, take steps to prevent the possibility of such future damage. And, by reason of the absence of a by-law, the case is not one in which compensation is being awarded under the provisions of the Municipal Act as for lands injuriously affected by the work that has been done. In that case every claim for compensation would

be settled once for all. Here the plaintiff is confined to such damages as properly and naturally result from each flooding; and alleged depreciation in the selling value is not comprised therein. This follows upon the principle that the damage, not the erection of the bridge, is the cause of action.

Lord Macnaghten's statement in *West Leigh Colliery Co. v. Tunnicliffe & Hampson Limited*, [1908] A.C. 27, at p. 29, made in a subsidence case, seems not to be distinguishable in principle from this case. After first expressing the opinion that the damage not the withdrawal of support was the cause of action, he said: "If this be so, it seems to follow that depreciation in the value of the surface owner's property brought about by the apprehension of future damage gives no cause of action by itself." And the Lord Chancellor said (p. 34): "To say that the surface land would sell for less because of the apprehension of future subsidence is no doubt true. To say that the depreciation in present value caused by that apprehension ought to be included as an element of compensation is, in my view, unsound. For that is asking compensation, not for physical damage which has in fact arisen, but for the present influence on the market of a fear that more such damage may occur in future." See also *Rust v. Victoria Graving Dock Co.* (1886), 36 Ch. D. 113.

A contrary view would involve the possibility of a purchaser who acquired the property at a reduced price afterwards recovering for the future apprehended damage from persons who had already been charged for it by an allowance against them for depreciation in selling value. The sum of \$2,000 allowed by the Referee under this head should be disallowed.

With regard to the other items of the claim, a number of which appear to be unsustainable and others to be exaggerated, there were some obvious mistakes and omissions in the summation of items. Allowing for these, and after examination of the particulars, and consideration of the evidence, it appears to me that a fair compensation to have allowed would have been the sum which my brother Garrow has named.

The result is, that the judgment should be varied by reducing the sum which the plaintiff is to recover from the defendants to \$1,320; and the cross-appeal should be dismissed.

The plaintiff should pay the costs of the appeal and cross-appeal.

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GARROW, J.A.:—Appeal by the defendant and cross-appeal by the plaintiff from the judgment of the Drainage Referee in favour of the plaintiff.

The proceedings were commenced by a writ of summons issued out of the High Court, dated the 28th December, 1909; and the action proceeded to trial in the usual way. At the trial, the action was referred to the Drainage Referee for trial, under the provisions of the Municipal Drainage Act.

The complaint of the plaintiff is, that the defendants had by their acts interfered with the free flow of the waters of Cedar creek by closing up a certain outlet, and erecting a bridge which materially narrowed the natural channel, thereby causing the plaintiff's lands to be flooded to his injury.

The cause of action thus disclosed is not, I think, one falling within the class of complaints for the trial of which special provision is made in the Municipal Drainage Act. But the order of reference was not moved against, and, moreover, appears to have been made by consent, although not so stated on its face, so that the decision in *McClure v. Township of Brooke* (1902), 5 O.L.R. 59 (C.A.), does not apply. And it should also be noted that, since that decision, the statutes have been further amended: 9 Edw. VII. ch. 78, sec. 2, practically restored sec. 94 of R.S.O. 1897, ch. 226, which, at the time of that decision, had been repealed by 1 Edw. VII. ch. 30, sec. 5. This may make it necessary, should the circumstances again arise, to reconsider *McClure v. Township of Brooke* in the light of subsequent statutory changes.

The learned Referee found the issues in favour of the plaintiff, and assessed the damages at \$5,000, for which the plaintiff has judgment, which damages, the plaintiff by his cross-appeal contends, should be increased.

The defendants, besides contending that the reference was improperly made to the Drainage Referee, say that the bridge and its openings are sufficient for the waters which by nature would flow in the stream, and that the injury of which the plaintiff complains is really caused by additional waters brought into it in large quantities by several extensive drainage schemes, having their outlets above the bridge, and that, in any event, the damages allowed are excessive.

The defendants also contended before us that the plaintiff's

claim was barred by the special limitation clauses of the Municipal Drainage Act. There was no plea of the Statute of Limitations; and, even if there had been, it would have been of no avail, because the plaintiff's claim from its nature does not fall within the special provisions of that Act.

Coming now to what may be called the merits: the facts seem to be very fairly and also with considerable fullness stated in the judgment of the learned Referee. He arrived at the conclusion, upon the evidence, that the effect of the new bridge built in the year 1907 was materially to narrow the stream; and that such narrowing and the closing up at the same time of the opening at the westerly end of the former bridge, through which a large portion of the water flowing in the stream had for years escaped, had caused the flooding of which the plaintiff complains. And the evidence, in my opinion, amply justifies these findings, although it is quite probable that the extent of the flooding, which it is sought to attribute wholly to the defendants' acts, is considerably exaggerated.

No by-law for the erection of the bridge was proved, and no expert or other evidence was given to shew any necessity for so constructing a bridge as that its solid approaches should narrow the channel, as this bridge undoubtedly does, from about 100 feet to about 65 feet.

The new bridge was, no doubt, required for the purposes of the highway; and, if it had been so constructed as to leave open the full width of the natural channel—less, of course, any necessary piers placed in it for the support of the bridge, including even the closing up of the westerly opening—the plaintiff could not, I think, have successfully complained. What he does complain of, and with justice under the circumstances, is the combination of the two things.

Mr. Rodd contended that the bridge, as it is, is sufficient for all the water which would naturally flow in the stream, and that the flooding of which the plaintiff complains was really due to other water brought into it by a series of artificial ditches and drains up-stream from the bridge, which use the stream as their outlet. And there is no doubt, upon the evidence, that the water which, in a state of nature, would naturally flow in the stream, has been substantially increased by these drainage works. The

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whole neighbouring territory is very low and flat. A large part of the plaintiff's lands was a marsh, in part below lake level, until reclaimed as far as it has been by his extensive drainage works, which necessarily included an embankment to keep the water out and a pumping arrangement in addition. A running stream is, up to its carrying capacity, a natural outlet for drainage water, and there is, I think, no reliable evidence, that, if the whole natural width of the banks had been maintained, they could not have contained and carried even those additional waters. But, however that may be, it seems to be not a good answer to the plaintiff's complaint to say, "Our narrowing of the channel would have been quite harmless but for such additional water." These drainage works had all, or nearly all, been established before the last bridge was built, and their waters were then being carried in the stream past the plaintiff's lands without injury, escaping in part under the old bridge, and in part through the westerly opening before mentioned. The place of the latter as an escape is by no means supplied by the opening at the east side of the new bridge; among other reasons, because, before the water reaches it, it must all pass through the bridge; whereas the opening at the west end permitted water to escape before it reached the bridge. In the absence of any satisfactory explanation, it seems to me to have been a great mistake to close that opening, even to save the expense of maintaining an additional bridge over it, which was, I suppose, the real reason for doing so. But, as I have said, in effect, the defendants might have been blameless if, in closing it, they had not also narrowed the channel.

As to the damages, I am inclined to agree with Mr. Rodd that the case is not one in which there should be a recovery as for a permanent injury. The erection complained of is upon the highway, and is wholly under the control of the defendants, and may at any time be so modified or changed as to remove all just cause of complaint. It is not, under the circumstances, the erection of the bridge which alone gives a cause of action to the plaintiff, but the flooding. And the flooding is not continuous, but only occasional. And for each occasion a new right of action would accrue. If there had been a by-law authorising the erection of the bridge, the plaintiff's proper remedy would, I suppose, have been under the arbitration clauses of the Municipal Act, in which



case his damages would have been ascertained and fixed once for all. But, there being no by-law, and the defendants objecting, doubtless for good reasons, I think the sum (\$2,000) allowed by the learned Referee under this head cannot stand. See *Darley Main Colliery Co. v. Mitchell* (1886), 11 App. Cas. 127; *West Leigh Colliery Co. v. Tunncliffe & Hampson Limited*, [1908] A.C. 27. *Arthur v. Grand Trunk R.W. Co.* (1895), 22 A.R. 89, in which a contrary conclusion was reached in the case of a railway company permanently interfering with a watercourse by the construction of their line, is, I think, distinguishable. See also *McGillivray v. Great Western R.W. Co.* (1865), 25 U.C.R. 69.

The other items of damages all appear to me more or less excessive. The learned Referee made a considerable reduction, but, in my opinion, by no means enough, especially in the case of two items which I will presently deal with. He assumed to reduce a total of \$4,690 by \$1,690. But the correct total is only \$4,184.90. Included in this is an item in the particulars of \$2,200, which the plaintiff himself says was only intended to be \$1,700. So that, making the correction, the total of these items would stand at \$3,684.90. And deducting the \$1,690 taken off by the learned Referee, the result would be \$1,994.90. But the \$2,200 item for loss of 17 acres of tobacco land in 1909, and the one next of loss of 15 acres in the previous year, which is put at \$692, both of which are clearly for estimated future profits upon crops which were never even sown, are quite too remote, and cannot be allowed. Unfortunately, the learned Referee has not, in his judgment, discussed this question, although the foundation for what, in my opinion, is the proper measure of such damages is given in the evidence, namely, the annual value of the land. This is placed by the plaintiff himself at the highest at \$10 per acre, for what is called "tobacco land," and for ordinary land \$3 to \$3.50 per acre. The total loss on those two items at \$10 per acre would be only \$320, instead of the enormous sums which the plaintiff claims; and at that sum, I think, they may, with justice to the plaintiff, stand.

The other items in the particulars not before dealt with amount in all to \$1,291.90. I do not propose to deal with each of them in detail. I do not, of course, know how much of the total deduction of \$1,690 which the learned Referee made he

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intended to ascribe to the two items with which I have just dealt. But, from what is said in the judgment, it may, I think, be assumed that he did not intend the reduction to be wholly confined to them. With this idea, I think a proper and indeed a liberal sum to allow in respect of all the remaining items which make up the \$1,291.90 would be \$1,000, or in all, with the \$320 for the tobacco lands, \$1,320, to which sum the judgment should, in my opinion, be reduced.

And, in view of the very substantial relief so afforded to the defendants, to obtain which an appeal was necessary, I think the plaintiff should pay the costs of the appeal; and that the cross-appeal should be dismissed with costs.

MACLAREN, J.A., concurred.

MAGEE, J.A.:—It is manifest that the matters involved are not such as under the Municipal Drainage Act (9 Edw. VII. ch. 78, sec. 1) or 10 Edw. VII. ch. 90, sec. 98, should have been brought in the first place before the Referee appointed under that Act. No petition, report, resolution, or by-law relative to drainage is attacked, nor is there any claim or dispute in respect of anything done or required to be done under that Act or consequent thereon or by reason of negligence in any such regard, nor was any mandamus or injunction asked in respect of any such matter.

The defendants, however, set up that, because, as they alleged, the damage, if any, had in part resulted from the drainage works of other municipalities, the High Court of Justice had no jurisdiction to try the issues. The plaintiff seems to have acquiesced in the propriety of transferring the case to the Drainage Referee; and, on his application, an order was made, evidently by consent, as is stated and appears from the correspondence. That order, dated the 18th May, 1910, recites that it appears that this action involves the question of drainage, and it directs that the matters in dispute between the parties be transferred for trial by the Referee appointed under the Municipal Drainage Act, to be tried pursuant to the provisions of that Act, and all proceedings might be had and taken as if the action had originally been brought under and by virtue of the said Act, and that all costs, including the extra costs, if any, occasioned by not bringing the

action originally under the provisions of that Act, should be in the discretion of the Referee.

Although not properly a claim which should have been brought before the Drainage Referee, there is also power under sec. 99 of the Municipal Drainage Act, 10 Edw. VII. ch. 90 (formerly sec. 93A, as enacted in 9 Edw. VII. ch. 78, sec. 2) to transfer an action to the Referee if the Court or Judge is of opinion that the same may be more conveniently tried before and disposed of by the Referee. That section provides that the Referee shall thereafter give directions for the continuance of the action before him, which shall be as far as practicable in conformity with the provisions of that Act; and, subject to the order, all costs shall be in his discretion. There is nothing to shew that this power of transference for more convenient trial was not intended to be exercised. The order must now be taken to have been properly made.

If the defendants had merely maintained the bridge and embankments, which were contributed to if not constructed by them in 1892, or had merely replaced the bridge with another having as wide an opening for the water, I do not think the evidence would have established that any injury would have been caused to the plaintiff's land by obstruction therefrom to the flow of waters naturally passing down Cedar creek or coming from lands naturally or actually draining into it at the time that bridge was built.

If there would have been any flooding over his dyke, it would have been owing to what the witnesses call an immense body of water poured into the creek by artificial drains constructed after 1892 from lands some of which at least did not naturally belong to its watershed and were not riparian to it.

Whether that artificial increase of the waters was rightful or wrongful, the township corporation, knowing of it when building the new bridge in 1907, chose to narrow the passage still further; and, whereas the old bridge had an opening of 70 feet, less the width of four or five piles, that of the new one was only 62 to 66 feet. Thus, except possibly as to ice and logs, they aggravated the condition of probable danger to the plaintiff, and made themselves parties to the injury which subsequently resulted to him from the combination, and rendered themselves liable to him therefor.

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The plaintiff had no right to have the passage across the intervening strip of land to the lake, which the creek had in 1897 forced for itself below his land and above the bridge, kept open by the owner of that strip of land or by the defendants. And although, when the defendants closed that passage in 1907, the natural bed of the stream had to some extent filled up with silt, owing probably, in part at least, to the current being diminished by that forced passage, and was in consequence less able to carry off the water, yet the other cut to the lake, which was opened in 1908, immediately below the bridge, seems to have fully made up for that, and afforded sufficiently free course for the water when once it had passed the bridge. But the real trouble was at the bridge itself, and for that the defendants had made themselves liable.

I agree that the plaintiff was not entitled to damages as for permanent injury to or supposed reduction in value of his lands from possible future recurrence of floods or the danger of them from this preventable cause. Indeed, the danger of flood from Lake Erie itself during its periods of high water would sufficiently account for any reduced value. I also agree that the other damage assessed should be reduced as indicated by my brother Garrow, and that the judgment should be varied accordingly.

*Judgment below varied.*

END OF VOLUME XXV.

# APPENDIX I.

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## SUPREME COURT OF JUDICATURE FOR ONTARIO.

RULES PASSED 23RD DECEMBER, 1911.

**1322.** (1) When an application is made to a Judge in Chambers under section 110 of the Ontario Judicature Act, and it appears to him that the action is one which ought to be tried without a jury, he shall direct that the issues shall be tried and the damages assessed without a jury, and in case the action has been entered for trial shall direct the action to be transferred to the non-jury list.

(2) The refusal of such an order by the Judge in Chambers shall not interfere with the right of the Judge presiding at the trial to try the action without a jury. Nor shall an order made in Chambers striking out a jury notice interfere with the right of the Judge presiding at the trial to direct a trial by jury.

(3) The Judge presiding at a jury sittings, or a jury and non-jury sittings, in Toronto, may in his discretion strike out the jury notice and transfer the action for trial to a non-jury sittings, and this power may be exercised notwithstanding that the case is not on the peremptory list for trial before the said Judge.

**1323.** Rule 56 is hereby further amended by adding thereto the following sub-section:—

(6) From and after the 31st of March, 1912, the interest on the accounts mentioned in sub-section 4 shall be increased to  $4\frac{1}{2}$  per cent. per annum, and shall be payable at the said rate, so long as the state of the funds in the hands of the Court justifies the continuance thereof.

**1324.** (1) When money is in Court to the credit of an infant or lunatic, it may be paid out upon the fiat of a Judge in Chambers without formal order. Such fiat shall be prepared by the Official Guardian, and shall be entered at length in the order book of the Clerk in Chambers, and shall be deposited with the Accountant.

No law stamp shall be required upon such fiat. The Judge may in his discretion fix and direct payment of the costs of the application to the solicitor, and dispense with the affidavit required by Rule 1314.

The fiat may be signed either by the Judge or the Clerk in Chambers.

(2) When an order has been made for payment of maintenance out of money in Court to which an infant is entitled, the cheque shall, upon application to the Official Guardian, be obtained and forwarded by him without expense to the applicant. A notice to that effect shall be stamped upon all cheques issued for maintenance.

(3) No law stamp shall be required upon any such cheque.

1325. (a) Where land has been sold under the provisions of the Devolution of Estates Act, and money has been paid into Court to the credit of non-concurring heirs and devisees, the same shall be paid out to them upon application to the Accountant without order.

(b) When money has been paid into Court under the said Act to the credit of an absentee, it shall be paid out to him upon the fiat of a Judge, to be obtained upon proof of identity, after notice to the Official Guardian.

RULE PASSED 4TH MAY, 1912.

1326. Rule 416 is hereby repealed.

## APPENDIX II.

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Cases reported in the Ontario Law Reports and Ontario Weekly Notes decided on appeal to the Judicial Committee of the Privy Council and the Supreme Court of Canada, reported since the publication of volume 24 Ontario Law Reports:—

CLARK v. BAILLIE, 19 O.L.R. 545, 20 O.L.R. 611, affirmed by the Supreme Court of Canada: CLARKE v. BAILLIE, 45 S.C.R. 50.

GRIFFITH v. GRAND TRUNK R.W. Co., 2 O.W.N. 1059, affirmed by the Supreme Court of Canada: GRAND TRUNK R.W. Co. v. GRIFFITH, 45 S.C.R. 380.

LESUEUR v. MORANG & Co. LIMITED, 20 O.L.R. 594, affirmed by the Supreme Court of Canada: MORANG & Co. v. LESUEUR, 45 S.C.R. 95.

MACKENZIE v. MONARCH LIFE ASSURANCE Co., 23 O.L.R. 342, reversed by the Supreme Court of Canada: MACKENZIE v. MONARCH LIFE ASSURANCE Co., 45 S.C.R. 232.

RAY v. WILLSON, 24 O.L.R. 122, affirmed by the Supreme Court of Canada: RAY v. WILLSON, 45 S.C.R. 401.

ROSS v. CHANDLER, 19 O.L.R. 584, affirmed by the Supreme Court of Canada: ROSS v. CHANDLER, 45 S.C.R. 127.

WHICHER v. NATIONAL TRUST Co., 22 O.L.R. 460, reversed by the Judicial Committee, and S.C., 19 O.L.R. 605, restored: NATIONAL TRUST Co. v. WHICHER, [1912] A.C. 377.





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## APPEAL.

*Privy Council—Security—Stay of Execution—Practice—Privy Council Appeals Act, secs. 3, 4, 5—Con. Rule 832 (d).*]—Upon the perfecting of the security required by sec. 3 of the Privy Council Appeals Act, 10 Edw. VII. ch. 24 (O.), upon an appeal to the Privy Council, execution in the original cause is (unless otherwise ordered) stayed, by force of sec. 4—no rules having been made by the Judges of the Supreme Court of Judicature for Ontario, as contemplated by sec. 5. The exception in Con. Rule 832 (d), in regard to judgments directing the payment of money, is not applicable, having regard to the change made by sec. 4.—History of the statutory provisions and Rules relating to appeals to the Privy Council.—Order of CLUTE, J., reversed. *Stavert v. Campbell*, 515.

See CONTRACT, 1—COSTS, 1—DAMAGES, 2, 3—PRINCIPAL AND AGENT.

## ARBITRATION AND AWARD.

*Valuation of Assets of Business—Appointment of Third Arbitrator—Alleged Impropriety—Proceeding with Arbitration notwithstanding—Award Drafted by Solicitor for one Party—Amount Left Blank—Allowance for Goodwill—Motion to Set aside Award—Contradictory Affidavits—Setting aside or Revoking Submission—R.S.O. 1897, ch. 62, secs. 3, 45—Action to Enforce Award—Motion to be Made in Action—Extension of Time for Moving—Perjury.*]—Upon an application by Z. to set aside an award of arbitrators (two out of a board of three) fixing a sum to be paid by Z. "for all the interests of H. arising in any manner whatsoever in connection with the assets" of an hotel, of which H. had been lessee, an order was made by a Judge setting aside the award; and H. appealed:—*Held*, upon the evidence, that there was no impropriety in the appointment of the third arbitrator; and, if there was, Z., the party complaining, was not free from blame; and, at any rate, it was too late to object, after the parties, knowing the circumstances connected with the appointment, had proceeded with the arbitration and taken their chance of a favourable award.—2. That the preparation by the solicitor for H. of a form of award, with the amount left blank, and its use by the arbitrators in making their award, was not misconduct which would justify the setting aside of the award; the only possible award was one in favour of H. for some amount.—Review of the authori-

ties. — 3. That the question whether the arbitrators had allowed anything for goodwill should not be tried on affidavits; and the award should not be set aside on the ground that they had done so, when only one arbitrator swore to that effect, and was contradicted by the others. — 4. That, on the motion to set aside the award, the Court could not set aside the submission, even if obtained by fraud or mistake. It was doubtful whether Z. would be allowed to revoke his submission under R.S.O. 1897, ch. 62, sec. 3, after award made, even if he established fraud or mistake; but it could not, in any event, be done simply upon affidavits which were squarely contradicted. — 5. That the award should be allowed to stand, and H. left to his action to enforce it; and Z. should be allowed, in that action, to move to set the award aside, the time for doing so being enlarged, under R.S.O. 1897, ch. 62, sec. 45. — 6. That, if H. undertook either to abandon the award or, within six weeks, to bring an action to enforce it, and not to object in the action to the regularity of a motion by Z. to set it aside, the appeal should be allowed; but, if H. refused to give the undertaking, the appeal should be dismissed. — Remarks by RIDDELL, J., on the contradictory statements in the affidavits, shewing that there was perjury by one set of deponents or the other. *Re Zuber and Hollinger*, 252.

*See* SURROGATE COURTS.

## ASSESSMENT OF DAMAGES.

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## ATTORNEY-GENERAL.

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## BANKS AND BANKING.

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## BILLS OF EXCHANGE.

*Conversion—Incorporated Club—Cheques Payable to Order of Club—Authority of Secretary to Indorse—Cheques Cashied by Banks and Proceeds Misapplied by Secretary—Cheques Deposited to Credit of Secretary in Private Account with Trust Company—Non-liability of Banks—Liability of Trust Company—Negligence—Restitution Cheques—Reduction of Liability.*—The secretary of an incorporated club (the plaintiff) received from members of the club, in payment of their dues, certain cheques, payable to the order of the club, indorsed them in the club's name, signing his own name as secretary, and, instead of depositing them at the club's bank to the club's credit, procured cash for them from two banks (defendants), and dishonestly retained it. By the rules of the club, the secretary was to receive all club moneys and pay all accounts; and the entrance fees, subscriptions, and

dues were to be paid to him:—*Held*, upon the evidence, that the secretary had general authority from the club to indorse cheques in its name, and that these defendants were not liable to the club for the conversion of the cheques; *MACLAREN, J.A.*, dissenting.—*Judgment of BOYD, C.*, affirmed.—The secretary similarly indorsed other cheques of members and deposited them to his own credit with the third defendant, a trust company, his banker, and drew out the amounts deposited and dishonestly retained them, but restored to the club a portion, by drawing five cheques upon the trust company and depositing them to the club's credit at its own banker's:—*Held (MEREDITH, J.A.*, dissenting), that the trust company was, in the circumstances, negligent in receiving these cheques, plainly the property of the club, and in placing the proceeds, either before or after collection, to the credit of the secretary in his own personal account; and the trust company was, therefore, a party or privy to the secretary's breach of trust, and accountable to the club in respect of the amount of the cheques so received, less, however, the amount restored by means of the five cheques.—*Judgment of BOYD, C.*, reversed. *Toronto Club v. Dominion Bank, Toronto Club v. Imperial Bank of Canada, Toronto Club v. Imperial Trusts Co. of Canada*, 330.

#### BOARD OF AUDIT.

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#### CARRIERS.

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#### CASES.

*Barnardo v. McHugh*, [1891] A.C. 388, followed.] — See *INFANT*.

*Bateman v. County of Middlesex* (1911), 24 O.L.R. 84, affirmed.] — See *DAMAGES*, 2.

*Beal v. Michigan Central R.R. Co.* (1909), 19 O.L.R. 502, distinguished.] — See *SURROGATE COURTS*.

*Bennett v. Havelock Electric Light Co.* (1910), 21 O.L.R. 120, reversed.] — See *COMPANY*, 2.

*Bigelow v. Powers* (1910), 20 O.L.R. 559, affirmed; but new trial ordered.] — See *PARTNERSHIP*.

*Bowes v. City of Toronto* (1858), 11 Moo. P.C. 463, discussed.] — See *MUNICIPAL CORPORATIONS*, 9.

*Boydell v. Drummond* (1809), 11 East 142, not followed.] — See *VENDOR AND PURCHASER*, 1.

*Cellular Clothing Co. v. Maxton & Murray*, [1899] A.C. 326, specially referred to.]—See TRADE MARK.

*Chandler & Massey Limited v. Irish* (1911), 24 O.L.R. 513, affirmed.]—See COMPANY, 1.

*Christopherson v. Naylor* (1816), 1 Mer. 320, followed.]—See WILL, 2.

*Clergue v. Preston* (1904), 8 O.L.R. 94, distinguished.]—See VENDOR AND PURCHASER, 1.

*Clay v. Rufford* (1849), 8 Hare 281, followed.]—See MUNICIPAL CORPORATIONS, 1.

*Clydebank Engineering and Shipbuilding Co. v. Don José Ramos Yzquierdo y Castaneda*, [1905] A.C. 6., specially referred to.]—See MECHANICS' LIENS.

*Coghlan v. Cumberland*, [1898] 1 Ch. 704, followed.]—See SURROGATE COURTS.

*De Nicols, In re, De Nicols v. Curlier*, [1900] 2 Ch. 410, followed.]—See CONTRACT, 1.

*Dove v. Dove* (1868), 18 C.P. 424, followed.]—See MUNICIPAL CORPORATIONS, 1.

*Ellis and Town of Renfrew, Re* (1911), 23 O.L.R. 427, 435, *dictum* in, not followed.]—See MUNICIPAL CORPORATIONS, 8.

*Erie County Natural Gas and Fuel Co. v. Carroll*, [1911] A.C. 105, distinguished.]—See DAMAGES, 1.

*Farquharson v. Barnard Argue Roth Stearns Oil and Gas Co.* (1910), 22 O.L.R. 319, affirmed.]—See DEED, 2.

*Farrell v. Gallagher* (1911), 23 O.L.R. 130, approved and followed.]—See MECHANICS' LIENS.

*Ford v. Canadian Express Co.* (1910-11), 21 O.L.R. 585, 24 O.L.R. 462, explained.]—See MALICIOUS PROSECUTION.

*Foster v. Emerson* (1854), 5 Gr. 135, followed.]—See LIMITATION OF ACTIONS.

*Frewen v. Frewen* (1875), L.R. 10 Ch. 610, applied and followed.]—See WILL, 3.

*Gagne v. Rainy River Lumber Co.* (1910), 20 O.L.R. 433, referred to.]—See PARTIES.

*Giles and Town of Almonte, Re* (1910), 21 O.L.R. 362, distinguished.]—See MUNICIPAL CORPORATIONS, 7.

*Gude v. Worthington* (1849), 3 DeG. & Sm. 389, considered and distinguished.]—See WILL, 6.

*Haldimand Dominion Election Case* (1888), 1 Ont. Elec. Cas. 529, specially referred to.]—See MUNICIPAL CORPORATIONS, 8.

*Halladay v. City of Ottawa* (1907), 14 O.L.R. 458, distinguished.]—See MUNICIPAL CORPORATIONS, 6.

*Henderson v. Henderson* (1896), 23 A.R. 577, followed.]—See LIMITATIONS OF ACTIONS.

*Herrick v. Sixby* (1867), L.R. 1 P.C. 436, followed.]—See DEED, 1.

*Hichens v. Congreve* (1828), 4 Russ. 562, followed.]—See MUNICIPAL CORPORATIONS, 1.

*Hoeffler v. Irwin* (1904), 8 O.L.R. 740, followed.]—See CONTRACT, 2.

*Hollinrake v. Truswell*, [1894] 3 Ch. 420, 427, followed.]—See COPYRIGHT.

*Hooper, Re* (1861), 29 Beav. 656, followed.]—See WILL, 3.

*Hunter, Re* (1911), 24 O.L.R. 5, reversed.]—See WILL, 4.

*Jones v. Toronto and York Radial R.W. Co.* (1911), 23 O.L.R. 331, reversed.] — See STREET RAILWAYS, 1.

*Kaiserhof Hotel Co. v. Zuber* (1911), 23 O.L.R. 481, affirmed.] — See MORTGAGE.

*Keffer v. Keffer* (1877), 27 C.P. 257, distinguished.] — See LIMITATION OF ACTIONS.

*Kennedy v. City of Toronto* (1886), 12 O.R. 211, specially referred to.] — See MUNICIPAL CORPORATIONS, 9.

*Lawlor v. Lawlor* (1882), 10 S.C.R. 194, followed.] — See LIMITATION OF ACTIONS.

*Leslie v. Pere Marquette R.W. Co.* (1911), 24 O.L.R. 206, affirmed.] — See RAILWAY, 3.

*Lincoln Election Petition, Re* (1878), 4 A.R. 206, specially referred to.] — See MUNICIPAL CORPORATIONS, 8.

*Longdon v. Bilsky* (1910), 22 O.L.R. 4, explained.] — See MALICIOUS PROSECUTION.

*Ludbrook v. Ludbrook*, [1901] 2 K.B. 96, followed.] — See LIMITATION OF ACTIONS.

*McAllister, Re* (1911), 24 O.L.R. 1, affirmed.] — See WILL, 1.

*McClure v. Township of Brooke* (1902), 5 O.L.R. 59, distinguished.] — See MUNICIPAL CORPORATIONS, 3.

*McGrath, In re*, [1893] 1 Ch. 143, followed.] — See INFANT.

*McKillop, Township of, v. Township of Logan* (1899), 29 S.C.R. 702, discussed.] — See MUNICIPAL CORPORATIONS, 2.

*McLellan v. McLellan* (1911), 23 O.L.R. 654, affirmed.] — See GIFT.

*Mawman v. Tegg* (1826), 2 Russ. 385, 390, 391, specially referred to.] — See COPYRIGHT.

*Orangeville Local Option By-law, Re* (1910), 20 O.L.R. 476,

specially referred to.] — See MUNICIPAL CORPORATIONS, 8.

*Phillips v. City of Belleville* (1905), 9 O.L.R. 732, discussed.] — See MUNICIPAL CORPORATIONS, 9.

*Phillips v. City of Belleville* (1906), 11 O.L.R. 256, 259, followed.] — See MUNICIPAL CORPORATIONS, 9.

*Polhill v. Walter* (1832), 3 B. & Ad. 114, distinguished.] — See CONTRACT, 2.

*Regina v. Barnardo*, [1891] 1 Q.B. 194, followed.] — See INFANT.

*Regina v. Gyngall*, [1893] 2 Q.B. 232, followed.] — See INFANT.

*Regina v. Greene* (1843), 4 Q.B. 646, 12 L. J. N. S. Q. B. 239, specially referred to.] — See COSTS 1.

*Regina v. Riley* (1898), Q.R. 7 Q.B. 198, 200, approved and followed.] — See CRIMINAL LAW, 3.

*Rex v. Sheehan* (1908), 14 Can. Crim. Cas. 119, 120, not followed.] — See CRIMINAL LAW, 3.

*Rex ex rel. Ivison v. Irwin* (1902), 4 O.L.R. 192, specially referred to.] — See MUNICIPAL CORPORATIONS, 8.

*Rogers v. Hosegood*, [1900] 2 Ch. 388, specially considered and explained.] — See VENDOR AND PURCHASER, 3.

*Salisfleet, In re Local Option By-law of the Township of* (1908), 16 O.L.R. 293, followed.] — See MUNICIPAL CORPORATIONS, 8.

*Scott v. Shepherd* (1773), 2 W.Bl. 892, 1 Sm. L.C., 11th ed., p. 454, applied.] — See INTOXICATING LIQUORS.

*Skull v. Glenister* (1864), 16 C.B.N.S. 81, followed.] — See DEED, 1.

*Thornhill v. Thornhill* (1819), 4 Madd. 377, followed.] — See WILL, 2.

*Toronto and Niagara Power Co. v. Town of North Toronto* (1911), 24 O.L.R. 537, reversed.]—See MUNICIPAL CORPORATIONS, 4.

*Wertheim v. Chicoutimi Pulp Co.*, [1911] A.C. 301, distinguished.]—See DAMAGES, 1.

*West Leigh Colliery Co. v. Tunnicliffe & Hampson Limited*, [1908] A.C. 27, 29, followed.]—See MUNICIPAL CORPORATIONS, 3.

*West Lorne Scrutiny, Re* (1911), 23 O.L.R. 598, reversed.]—See MUNICIPAL CORPORATIONS, 8.

*Williams, In re* (1868), 1 Ch. R. 372, followed.]—See WILL, 3.

### CHEQUES.

See BILLS OF EXCHANGE — GIFT.

### CLASS ACTION.

See MUNICIPAL CORPORATIONS, 1.

### CLUB.

See BILLS OF EXCHANGE.

### COLLUSION.

See MORTGAGE.

### COMPANY.

1. *Illegal Disposition of Assets—Acquisition by Shareholder of Shares in Another Company—Breach of Trust—Winding-up of Company—Right of Liquidator to Follow Assets.*]—*Held*, affirming the judgment of BOYD, C.; 24 O.L.R. 513, that, without consideration or legal authority, \$1,000 of the plaintiff company's funds was applied in payment for certain shares standing in the defendant's name; that the moneys so misapplied were trust funds;

and the trust attached to the shares purchased with the trust funds. *Chandler & Massey Limited v. Irish*, 211.

2. *Sale of Property to Company by Director—Agreement with Co-directors—Division of Purchase-money—Rights of Holders of Subsequently Acquired Shares—Absence of Secrecy and Fraud—Affirmance of Transaction by Company.*]—The judgment of a Divisional Court, 21 O.L.R. 120, was reversed, upon the facts, and that of BRITTON, J., *ib.*, dismissing the action, restored:—*Held*, *per* MACLAREN, J.A., that the company paid only a fair price for the property; and, if the defendant M. had simply sold it for that sum, and then had compensated the other defendants for the valuable services they had rendered him, there would have been no reasonable ground of complaint. There was no secrecy about the price paid; and there was no fraud. Any irregularities were such as might be condoned by the company; and, the company having, with full knowledge, ratified all that was done, the plaintiffs, who were only urging the claims of the company, could have no higher rights.—*Per* MEREDITH, J.A., that, if the defendant M. had retained the whole sum of \$5,000, found by the trial Judge to be but a fair price for the water power alone, no one could recover any part of it from him; no attempt had been made to recover from him the share of it retained by him; and no one could, legally or logically, recover any part of the shares which he chose to give to his co-defendants for their assistance. There was no ground for calling the trans-

action a fraud; it could not be said that the individual defendants were making a profit of their office of trustees for the shareholders; nor was the case like that of a servant receiving a secret commission on purchases made for his master. The right of action, if any, would be that of the company; and the company had repudiated the claims made in this action, and ratified and confirmed the transaction impeached in it. *Bennett v. Havelock Electric Light Co.*, 200.

See WILL, 5.

## CONTINUATION SCHOOLS.

See SCHOOLS.

## CONTRACT.

1. *Interest in Oil Leases—Oral Agreement—Evidence to Establish—Finding of Fact by Trial Judge—Reversal on Appeal—Partnership—Interest in Land—Statute of Frauds.*—The plaintiff claimed a one-third interest in certain oil leases, made to the defendants H. and P. as lessees; and asked to have these defendants and the defendants W. and R., to whom the leases had been assigned, declared trustees for her as to the one-third interest.—*Held*, upon the evidence (RIDDELL, J., dissenting), that, according to the agreement of the parties, the plaintiff and the defendants H. and P. were to be jointly and equally interested in the venture and in the leases.—Finding of fact of the Judge of the County Court of Haldimand reversed.—*Held*, also, that the plaintiff was not entitled to any relief against the defendants W. and R.; for, upon the evidence, it was contemplated by all the parties to

the agreement that the leases should be disposed of, and that they should share equally in the proceeds of the sale of them; and the full extent of the relief to which the plaintiff was entitled was to be paid by the defendants H. and P. one-third of the proceeds of the sale made to the other defendants.—*Held*, also, that, though the agreement was not in writing, the Statute of Frauds was not an answer to the plaintiff's claim; there may be an agreement of partnership by parol, notwithstanding that the partnership is intended to deal with land.—*In re De Nicols, De Nicols v. Curlier*, [1900] 2 Ch. 410, and older cases therein cited, followed. *Leslie v. Hill*, 144.

2. *Sale of Timber—Interest in Land—Statute of Frauds—Document Signed by Servant of Purchasers—Absence of Authority as Agent—Knowledge of Principal—Adoption of Contract—Insufficiency of Memorandum to Satisfy Statute—Part Performance—Taking Possession—R.S.O. 1897, ch. 32, sec. 3 (1), (3)—Liability of Agent—Misrepresentation of Authority—Vendor not Misled—Costs—Misconduct.*—The plaintiff, having a right from the Crown to remove all the timber upon an island, made a sale of it to the defendant firm, through two foremen who acted for the firm in buying and shipping ties. The plaintiff's brother and agent signed a receipt for \$100 as received from the firm, "being part payment on purchase of timber on Yeo Island"—mentioning the purchase-price, and that the balance was to be paid within a month. A copy was made of the receipt, and the defendant B., one of the two foremen, signed it

by the name of the firm, "per C. E. B." The \$100 was paid by a draft on the firm by B., explicitly "on account of purchase of Yeo Island." The firm paid the draft, but afterwards set up that it was for an option on the timber:—*Held*, that what was sold was an interest in land within the meaning of the Statute of Frauds.—*Hoeffler v. Irwin* (1904), 8 O.L.R. 740, followed.—2. On the evidence, that neither the defendant B. nor the other foreman had authority either to buy the timber or to sign a contract for the purchase.—3. That the defendant firm knew that B. had bought for them—and not simply taken an option; and, knowing this, they did not repudiate the agency or the contract, and must be regarded as having adopted the contract: they were in the position of having bought the timber, paid \$100 on the purchase, and signed a copy of the receipt given them by the plaintiff's agent; but this, the only document (except the draft) signed by or for them, was defective to charge them, the Statute of Frauds being pleaded.—4. That, having regard to the rights conferred upon a timber licensee by R.S.O. 1897, ch. 32, sec. 3 (1) and (3), the acts of the agents of the defendant firm, going to and landing upon the island, examining the timber, etc., amounted to a taking possession of the land, and a part performance which satisfied the statute.—5. That the action should not have been brought against B., as on an implied warranty of authority to make the contract and sign the document evidencing it, for his co-defendants; for B. told the plaintiff's agent that he did not know that he had any power

to give him a contract—the plaintiff's agent was not in fact misled.—*Polhill v. Walter* (1832), 3 B. & Ad. 114, distinguished.—6. That, though the action was dismissed as against B., it should be without costs, on account of misconduct. *Thomson v. Playfair*, 365.

See COMPANY, 2—DAMAGES, 1  
—MECHANICS' LIENS — PART-  
NERSHIP — RAILWAY, 1, 3 —  
STREET RAILWAYS, 2 — VENDOR  
AND PURCHASER.

### CONTRIBUTION.

See PARTNERSHIP.

### CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, 1 — STREET  
RAILWAYS, 1.

### CONVERSION.

See BILLS OF EXCHANGE.

### CONVICTION.

See CRIMINAL LAW.

### COPYRIGHT.

*Infringement — Law List — System of Indexing — Lists of Names in Part Copied—Submission for Alteration — Admission—Common Errors—Impossibility of Separating Pirated Parts — Injunction — Damages.*] — Copyright does not extend to ideas, or schemes, or systems, or methods, but is confined to their expression; and, if their expression is not copied, the copyright is not infringed.—*Hollinrake v. Truswell*, [1894] 3 Ch. 420, 427, followed.—And where the defendant adopted in his "Canada Legal Directory, 1911," the system of indexing by numbers the Toronto agents of Ontario solicitors, used by the plaintiff in



his "Canada Law List (Hardy's), 1910," but did not use the same numbers, it was *held*, that he had not infringed.—But where the defendant had, in the preparation of the lists of barristers and solicitors and of Judges and Court officials, for the purpose of getting his original information and for the preparation of lists for the printer, copied from the plaintiff's book substantially all the names found therein, although he had submitted his lists for correction and addition to the officials, and sent "correction slips" to the barristers and solicitors—the copying being shewn by his own admission and by common errors in the two publications—it was *held*, that he had infringed.—And *held*, also, that, although the defendant had, in the lists contained in his book, inserted a considerable amount of original information, it was not practicable, upon the evidence, to separate it from the pirated matter so as to leave the original material of any value or use for publication; and, therefore, the plaintiff was entitled to damages and to have the defendant enjoined from further printing, publishing, or selling the "Canada Legal Directory, 1911," or any reprint or future edition thereof, containing any of the lists of barristers and solicitors and of Judges and Court officials therein contained. — Review of the authorities. — *Mauman v. Tegg* (1826), 2 Russ. 385, 390, 391, specially referred to. *Cartwright v. Wharton*, 357.

### COSTS.

1. *Inherent Jurisdiction of Court—Motion to Quash Municipal By-law—Nominal Applicant*

*Put Forward by Real Litigants—Additional Security for Costs—Insufficiency of Amount Required—Real Litigant, though Stranger to Record, Ordered to Pay Deficiency—Judicature Act, sec. 119—Leave to Appeal—Refusal.*—As part of its inherent jurisdiction to prevent abuse of its process, the Court will stay proceedings, as being taken against good faith, when a man of straw is put forward by those really litigating, until they either give adequate security for costs or consent to be added as parties; this jurisdiction may be exercised as well in the case of a summary application to the Court as in an action; and the statutory requirement of security in a certain sum, upon a motion to quash a by-law, does not take away the right of the Court to require those invoking its aid to come before it and assume full responsibility for their actions or to supply such security as will be adequate to meet the costs of the opposite party. —Where a summary application to quash a local option by-law was made in the name of a man of straw, who was put forward by the real actors, two hotel-keepers, proceedings were stayed until they should give security for costs, in addition to the security required by the Municipal Act, 1903, sec. 378, sub-secs. 4, 5, 6, or consent to be added as applicants.—This order having been complied with by giving the additional security required, and the whole security having been found inadequate to satisfy the taxed costs of the respondents (the motion and also an appeal having been dismissed), an order was made by BOYD, C, requiring one of the aforesaid hotel-keepers to pay the balance of the respondents'

costs.—*Held*, by *Boyd, C.*, that the Court, under sec. 119 of the Judicature Act, has full power to determine by whom and to what extent costs are to be paid; and, in the exercise of its inherent power and equitable jurisdiction, will make a person who has set the Court in motion pay the costs of his unsuccessful application, though he be not formally a party.—*Held*, by a Divisional Court, affirming the order of *Boyd, C.*, that the Court has power to award costs against the real litigant when he brings a cause or matter before the Court in the name of a man of straw, for the purpose of avoiding liability for costs.—This jurisdiction is not confined to ejectment; and was exercised in a case where two ratepayers had put forward a third, a man without means, though not without interest, as applicant in an unsuccessful proceeding to quash a municipal by-law.—Review of the authorities.—*The Queen v. Greene* (1843), 4 Q.B. 646, 12 L.J.N.S.Q.B. 239, specially referred to.—Apart from the law and practice before the Judicature Act, sec. 119 of that Act, as found in R.S.O. 1897, ch. 51, gives full power to determine by whom and to what extent costs are to be paid, and makes clear the jurisdiction of the Court to award costs against a stranger to the record in a proper case.—Leave to appeal to the Court of Appeal was refused by *Moss, C.J.O.* *Re Sturmer and Town of Beaverton*, 190, 566.

2. *Unsuccessful Action to Set aside Will—Incidence of Costs.*—Where probate of a will was granted without opposition, and this action was afterwards brought to vacate the probate

and nullify the will, for alleged undue influence and testamentary incapacity, on insufficient evidence and without any proper inquiry, the plaintiff was ordered to pay all the costs of the defendants who actively defended.—Rules as to ordering payment of costs out of the estate and relieving unsuccessful litigants of the payment of costs, in causes testamentary. *McAllister v. McMillan*, 1.

See CONTRACT, 2 — LANDLORD AND TENANT—MUNICIPAL CORPORATIONS, 1.

## COURTS.

See SURREGATE COURTS.

## COVENANTS.

See LANDLORD AND TENANT—VENDOR AND PURCHASER, 3.

## CRIMINAL JUSTICE RETURNS.

See SHERIFF.

## CRIMINAL LAW.

1. *Gold and Silver Marking Act, 1908—Proportion of Gold in Article Kept for Sale — Ascertainment — Construction of sec. 11.* — The defendant was charged with having in his possession, with intent to sell, certain rings marked "9 ct.," meaning that they were of nine karat gold, whereas that number did not bear the same proportion to twenty-four karats as the weight of the gold in the metal or alloy bore to the gross weight thereof. The article produced in evidence was described as filled signet ring, composed of a hollow metal ring, the inside being filled with wax or cement:—*Held* (*MAGEE, J.A.*, dissenting), that, upon the true construction of sec. 11 of the Gold and Silver

Marking Act, 7 & 8 Edw. VII. ch. 30 (D.), the proportion of nine twenty-fourths gold, in the case of such an article, is to be ascertained, not by reference to the weight of the alloy of which the gold forms part, but by reference to the weight of the whole article; and there was in this case a contravention of the Act. *Rex v. Austin*, 69.

2. *Omitting to Provide Necessaries for Wife—Criminal Code, sec. 242 (2)—Foreign Decree—Effect of—Domicile—Likelihood of Permanent Injury to Wife's Health—Evidence—Findings of Jury.*—The defendant was tried upon an indictment charging him with refusing, neglecting, and omitting, without legal excuse, to provide necessaries for his wife, whereby her health was now and was likely to be permanently injured, contrary to the Criminal Code, sec. 242 (2). The defendant admitted the marriage, but alleged that he had obtained a valid decree of divorce in the State of Ohio; and he denied that the complainant's health was or was likely to be permanently injured for want of necessaries. The defendant was domiciled in Ontario at the time of the marriage; and the jury found that he had not acquired a new domicile in Ohio. The jury also found that the wife's health was likely to be permanently injured by the husband not supplying the necessaries of life. A general verdict of "guilty" was also found, and the defendant was convicted:—*Held*, upon a case stated, that the findings and verdict were supported by the evidence; that the decree of the Ohio Court was not conclusive on the question of domicile; and,

upon the finding of the jury as to domicile, had no efficacy in Ontario; and the conviction was affirmed.—*Quære, per MEREDITH, J.A.*, whether the domicile of the husband would be, in the circumstances of the case, also the domicile of the wife. *Rex v. Wood*, 63.

3. *Vagrancy—Criminal Code, sec. 238 (a)—"Visible Means of Maintaining himself"—Money Derived from Begging—Previous Conviction for Begging.*—Under a town by-law, a magistrate convicted the defendant of begging, and sentenced him to twenty days' imprisonment. The same magistrate also convicted the defendant of being a vagrant—a person without visible means of support—under sec. 238 (a) of the Criminal Code, and sentenced him to six months' imprisonment, the two terms to run concurrently to the extent of the twenty days. At the time of his arrest the defendant had in his pocket \$28, gathered by begging. After he had served the twenty days, he applied, upon *habeas corpus*, for his discharge:—*Held*, that the objection that the defendant was being punished twice for the same offence was not sustained by anything appearing in the return to the writ: so far as appeared, the offences were entirely different.—It was contended that, as the defendant had \$28 in his possession at the time of his arrest, he was not without "visible means of maintaining himself," and so was not a vagrant:—*Held*, that sec. 238 (a) of the Code requires more than the mere possession by the person charged of temporary means of support. The circumstances appearing in the evidence shewed that, apart from the pos-

session of the \$28, the defendant was not in the way of maintaining himself in such a manner that he was not likely to become a public burden or a nuisance in the streets. He was shewn to be a beggar; and he was living without other employment. The magistrate was entitled to look at all the circumstances; and he came to a reasonable conclusion.—*Order of Boyd, C.*, refusing to discharge the defendant, affirmed.—*Per Boyd, C.*:—The true meaning of “visible means” is visible lawful means. Persons who live without labour or visible means of support and idle away their time are mischievous and dangerous persons, who must either support themselves by unlawful means or become an undue charge on the public charity, and who are consequently nuisances to society in general.—*Regina v. Riley* (1898), Q.R. 7 Q.B. 198, 200, approved and followed.—*The King v. Sheehan* (1908), 14 Can. Crim. Cas. 119, 120, not followed. *Rex v. Munroe*, 223.

### CROSSING.

See RAILWAY, 3.

### DAMAGES.

1. *Contract to Take and Pay for Shares — Breach — Measure of Damages—Ascertainment of Market Price at Date of Breach—Subsequent Advantageous Sales.*—On the 23rd May, 1907, the defendants agreed to purchase from the plaintiff one million shares of the stock of a mining company, at the price of \$150,000—\$5,000 down and the balance in several instalments payable on different days during a period of about three months. On the 1st June, 1907, the defendants notified the

plaintiff that they did not intend to carry out the agreement; and on the 6th June, 1907, the plaintiff brought this action for specific performance or damages for breach of the contract. At the trial, judgment was given in the plaintiff's favour, with the option of taking specific performance or damages, and he elected to take damages:—*Held*, that the measure of the plaintiff's damages was the excess of the contract price over the market price at the time or times when the breach or breaches occurred; and the fact, if it was a fact, that the plaintiff afterwards recouped himself by making advantageous sales of the shares, did not lessen or alter the liability of the defendants.—*Erie County Natural Gas and Fuel Co. v. Carroll*, [1911] A.C. 105, and *Wertheim v. Chicoutimi Pulp Co.*, [1911] A.C. 301, distinguished.—Judgment of CLUTE, J., affirmed.—*Semble*, also, that the plaintiff had not really been recouped; he could shew the actual value of the stock taken in exchange for the stock in question. *Sharpe v. White*, 298.

2. *Personal Injury by Negligence—Assessment of Damages by Trial Judge—Appeal.*—The judgment of RIDDELL, J., 24 O.L.R. 84, was affirmed. *Bateman v. County of Middlesex*, 137.

3. *Personal Injury by Negligence—Assessment of Damages by Trial Judge—New Evidence on Appeal—Reduction of Damages—Principle of Assessment.*—The plaintiff's damages for personal injury by the negligence of the defendants having been assessed by a Judge at \$10,000, the Court of Appeal reduced the amount to \$7,000, evidence having been re-

ceived by the Court to shew that a large sum paid to the plaintiff, and said by her to be part of her earnings, was in fact paid upon another account. — *Per MEREDITH, J.A.*:—In estimating damages recoverable for personal injury by negligence, the jury must not attempt to award the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case and give what they consider, in all the circumstances, a fair compensation; and the same rule applies to a Judge. *Sheahan v. Toronto R.W. Co.*, 310.

See COPYRIGHT — INTOXICATING LIQUORS—MUNICIPAL CORPORATIONS, 3—PARTIES — PARTNERSHIP.

#### DEATH.

See GIFT — INTOXICATING LIQUORS—WILL.

#### DEED.

1. *Construction—Conveyance of Half of Irregularly Shaped Lot—Ascertainment of Division Line—Equality — Area — Frontage — Value—Surveys Act.*—The owner of a town lot, forming part of a triangular-shaped piece of land, sold the west half of the lot to the defendant in 1909, and the east half to the plaintiff in 1911. The lot was bounded on the south by D. street, the principal street of the town; it was not a parallelogram, but had a considerable slice taken off its north-east end by the diagonal trend of another street. The description in the conveyance to the defendant was, "the west half of lot 8 on the north side of D. street . . . reserving the right to build on all the remaining part of the lot . . . according to E.

and B.'s registered plan." In the conveyance to the plaintiff the description was, "the east half of lot 8 on the north side of D. street . . . according to" the same plan. There was a dispute as to the right line of division between the two half lots:—*Held* (MIDDLETON, J., dissenting), that the equality which the two deeds contemplated would be best preserved by giving, as far as possible, an equal division, as to area, as to the main and controlling frontage, and as to comparative advantages; and this should be accomplished by running the dividing line, beginning from D. street, parallel with the side lines as far as they were parallel, and bisecting the lot so far in equal parts; and then, when this dividing line reached the point opposite where the diagonal side of the lot lying to the east began, by deflecting the line and making it trend west from the centre of the lot to the northern boundary so as to give an equal area of land in that part of the lot to each half owner. *Skull v. Glenister* (1864), 16 C.B.N.S. 81, and *Herrick v. Sixby* (1867), L.R. 1 P.C. 436, followed.—The Ontario Surveys Act, R.S.O. 1897, ch. 181 (now 1 Geo. V. ch. 42) has no application to the situation.—*Per MIDDLETON, J.*:—A conveyance of a particular aliquot portion of a lot is a conveyance of an aliquot portion of the total area of the lot, quite irrespective of any question as to the value of the different parts of the lot. The purchaser of the west half acquired the west half of the total area. The deed, being free from ambiguity, must be interpreted by the words used. *Hooley v. Tripp*, 578.

2. *Conveyance of Land in Fee—Exception or Reservation — Construction—“Mines of Minerals” — “Springs of Oil”—Rock or Coal Oil—Natural Gas.*]—A reservation or exception, in a conveyance of land by the Canada Company to a farmer, in 1867, of “all mines and quarries of metals or minerals and all springs of oil in or under the said land, whether already discovered or not,” was held (MEREDITH, J.A., dissenting), not to include natural gas.—Judgment of BOYD, C., 22 O.L.R. 319, affirmed. *Farquharson v. Barnard Argue Roth Stearns Oil and Gas Co.*, 93.

#### **DIRECTORS.**

See COMPANY, 2.

#### **DISCHARGE OF MORTGAGE.**

See LIMITATIONS OF ACTIONS.

#### **DIVISION LINE.**

See DEED, 1.

#### **DIVORCE.**

See CRIMINAL LAW, 2.

#### **DOMICILE.**

See CRIMINAL LAW, 2.

#### **DONATIO MORTIS CAUSA.**

See GIFT—SURROGATE COURTS.

#### **DRAINAGE.**

See MUNICIPAL CORPORATIONS, 2.

#### **DRAINAGE REFEREE.**

See MUNICIPAL CORPORATIONS, 3.

#### **EASEMENT.**

See RAILWAY, 3.

#### **ELECTRIC POWER COMPANY.**

See MUNICIPAL CORPORATIONS, 4.

#### **ESTATE.**

See WILL.

#### **ESTOPPEL.**

See MUNICIPAL CORPORATIONS, 2.

#### **EVIDENCE.**

See CONTRACT, 1—DAMAGES, 3 — GIFT — NEGLIGENCE, 2 — RAILWAY, 2—VENDOR AND PURCHASER, 1, 2.

#### **EXECUTION.**

See APPEAL.

#### **FIRE INSURANCE.**

See INSURANCE, 2.

#### **FOREIGN DIVORCE.**

See CRIMINAL LAW, 2.

#### **FORFEITURE.**

See LANDLORD AND TENANT.

#### **FRAUD AND MIS-REPRESENTATION.**

See BILLS OF EXCHANGE — COMPANY, 2—RELEASE.

#### **GIFT.**

*Cheques on Banks — Presentment and Payment after Death of Donor—Notice of Death—Bills of Exchange Act, secs. 127, 167—Gift inter Vivos — Gift, Mortis Causa—Delivery of Bank Pass-books to Donee—Purpose of—Evidence.*]—The judgment of BOYD, C., 23 O.L.R. 654, affirmed. *McLellan v. McLellan*, 214.

See WILL.

## **GOLD AND SILVER MARKING ACT.**

See CRIMINAL LAW, 1.

## **GOODWILL.**

See ARBITRATION AND AWARD.

## **GROSS NEGLIGENCE.**

See RAILWAY, 2.

## **HIGHWAY.**

See MUNICIPAL CORPORATIONS,  
4, 5.

## **HUSBAND AND WIFE.**

See CRIMINAL LAW, 2.

## **ILLEGITIMATE CHILD.**

See INFANT.

## **IMPROVIDENCE.**

See RELEASE.

## **INDEMNITY.**

See INSURANCE, 1 — INTOXI-  
CATING LIQUORS—PARTIES.

## **INFANT.**

*Illegitimate Child — Custody — Rights of Mother and Putative Father.*—The mother of an illegitimate child, four months old, was awarded the custody as against the putative father.—The desire of the mother of an illegitimate child as to its custody is primarily to be considered. The dominant matter for the consideration of the Court is the welfare of the child — taking “welfare” in its widest sense. To deprive the mother of the custody, it is not enough to shew that the child will be well cared for by the putative father; he must also shew that the mother is, for some real reason, unfit to be intrusted with the care of her child.—*The Queen v. Barnardo*, [1891] 1 Q.B. 194, *Barnardo v. McHugh*, [1891] A.C. 388, *In re*

*McGrath*, [1893] 1 Ch. 143, and *The Queen v. Gynghall*, [1893] 2 Q.B. 232, followed. *Re C.*, an *Infant*, 218.

## **INJUNCTION.**

See COPYRIGHT — MUNICIPAL  
CORPORATIONS, 5.

## **INSURANCE.**

1. *Accident Insurance — Temporary Total Disability — Double Indemnity*—“*Riding as a Passenger*”—*Injury to Assured in Alighting from Street Car.*—In an action upon an accident policy issued by the defendants to the plaintiff, the assured, by the terms of which, in the case of temporary total disability, he was entitled to \$25 a week for the period of disability, it was found that the plaintiff had suffered injuries resulting in a temporary total disability, within the meaning of the policy.—The policy further provided that, if the injuries were sustained while the plaintiff was a “passenger,” which meant, as defined by the policy, “while riding as a passenger in or upon a public conveyance provided by a common carrier for passenger service,” he should be entitled to \$50 per week.—The plaintiff’s injuries were sustained in this way. He was a passenger on an open street car; he got off upon the highway when he arrived at his destination, but, before he reached the sidewalk, was confronted by danger from a passing automobile; in order to escape from that danger, he endeavoured to get on the street car again, and in doing so struck some part of the street car and was thrown down and so injured.—*Held*, that the plaintiff, when injured, was still a “passenger,” within the meaning

of the policy; either as not having completely or safely alighted and so being still in the act of alighting; or as being in the act of getting on the car to be carried to a place where he might alight with safety; and, therefore, he was entitled to the double indemnity. *Wallace v. Employers' Liability Assurance Corporation*, 80.

2. *Fire Insurance — Removal of Goods Insured — Assent of Insurers — Burden of Proof — "Binder" — Application Form — Acceptance by Initials of Clerk of Former Agents — Authority — Indorsement of Consent after Fire — Ratification.*—Goods of the plaintiffs insured by the defendants against fire were removed from the building in which they were, to another building. The plaintiffs sought to obtain the consent of the defendants to the change of locality, and made application to a firm of insurance agents who had been but had ceased to be the agents of the defendants, upon a form called a "binder," which is, in effect, an application for insurance, and, when accepted, becomes an interim receipt, constituting a binding contract of insurance, subject to the conditions of the policy to be issued upon it. The "binder" was presented to a clerk in the office of the defendants' former agents, and he, without inquiry and without consulting any one, initialled the application, and gave it to the plaintiffs' agent, placing a duplicate "on the file" in his masters' office. This was on the 14th January, 1909. The defendants had no notice or knowledge of the removal of the goods until some time in the following March, when the policy was sent to them by the plaintiffs for indorsement.

On the 19th March, the goods were destroyed by fire; and, shortly after that, the defendants' secretary, having no notice or knowledge of the fire, indorsed upon the policy a formal consent (dating it as of the 14th January) to the continuance of the insurance upon the goods in the building to which they had been removed:—*Held*, affirming the judgment of SUTHERLAND, J., that the defendants were not liable for the plaintiffs' loss.—*Per* GARROW, J.A.:—The "binder" should be regarded as if, when it was given, the agents by whose clerk it was initialled were still the agents of the defendants and had themselves given it. But the plaintiffs were bound, within a reasonable time, to produce the policy to the defendants for the purpose of having the further formal indorsement made. In doing this there was inexcusable delay; and, through no fault of the defendants, the indorsement was not made in time. The consent indorsed after the fire did not bind the defendants, it having been given in ignorance that a fire had occurred. The fire had completely altered the relation of the parties, and had fixed their respective rights and obligations under the contract as it then stood. That the consent was antedated was of no consequence; the defendants could not be assumed to have intended to ratify the binder, of which they then knew nothing.—*Per* MEREDITH, J.A.:—An insurance of goods in one building or locality is not an insurance of them in another building or locality; the removal of them from one place to another requires that which is tantamount to a new contract in order to pre-



serve the insurance. Assuming that the plaintiffs might deal with the former agents as if they were still agents of the defendants, it could not justly be said that, before the loss, the plaintiffs had obtained a binding consent of the defendants to the change of locality, the burden of proof of which was upon the plaintiffs. *Kline Brothers & Co. v. Dominion Fire Insurance Co.*, 534.

### INTOXICATING LIQUORS.

*Excessive Drinking in Hotel—Death from Exposure to Cold—Action by Personal Representative for Indemnity or Damages—Liability of Owner of Hotel and Bar-tender—Wrongdoers—Insurers—Liquor License Act, sec. 122—Proximate Cause of Death—“Caused by such Intoxication.”*—The legal representative of P., deceased, brought this action against an hotel-keeper and his bar-tender, under sec. 122 of the Liquor License Act, R.S.O. 1897, ch. 245, to recover indemnity or damages for the death of P., who was alleged to have come to his death by perishing from cold on a December day, while in a state of intoxication from liquor drunk by him to excess in the defendant M.'s hotel, furnished by the defendant C., the bar-tender. The evidence shewed that P. was drunk when he left the hotel, from liquor furnished to him there, and that he and two companions, who were also then drunk, started to walk home, a distance of twelve or fourteen miles, and on the way took several drinks from bottles of spirits which they had obtained at the hotel. P. was found about half way between the hotel and his home, lying on his back in the snow; he was taken home at

once, and died in a few minutes after arrival there. The evidence as to when they took drinks from the bottles was not satisfactory; but the inference was that they did not do so for a considerable time after they started:—*Held*, upon the evidence, that P. perished from cold; that he continued to be intoxicated from the excessive drinking in the hotel from the time he left it until his death; and thus it was “while in a state of intoxication from such drinking” that he came to his death, by perishing from cold.—*Held*, also, that the perishing from cold was “caused by such intoxication,” within the meaning of sec. 122.—That section gives a right of action, if the facts set forth in it are established in evidence, “as for personal wrong;” the principles applicable to actions of that nature apply to an action under the section; and, applying those principles, the liability depends upon whether the act of the defendant was the proximate cause of the injury, and it is immaterial whether the act of some other conduced or contributed to the injury, or may even have been the immediate cause of the injury.—*Scott v. Shepherd* (1773), 2 W. Bl. 892, 1 Sm. L.C., 11th ed., p. 454, applied.—And *held*, upon the evidence, that the intoxication of P., from the liquor furnished to him, and drunk by him to excess in the hotel, was the proximate cause of his death.—*Held*, also, that, if the legal effect of the enactment was to impose upon the defendants liability as insurers of the life of a person intoxicated, in the circumstances therein stated, against the contingencies therein mentioned—that is, if, while so intoxicated,

he meets his death by perishing from cold or other accident *caused by such intoxication*—upon the facts of this case, the defendants were liable as such insurers. *De Struve v. McGuire*, 87, 491.

See MUNICIPAL CORPORATIONS, 6, 7, 8.

### INVESTMENT.

See WILL, 5.

### JURISDICTION.

See COSTS, 1—MUNICIPAL CORPORATIONS, 3—STREET RAILWAYS, 2—SURROGATE COURTS.

### JURY.

See MALICIOUS PROSECUTION—MINES AND MINERALS, 1—NEGLIGENCE, 1, 2—PARTNERSHIP—STREET RAILWAYS, 1.

### LANDLORD AND TENANT.

*Lease—Covenants to Repair and Keep in Repair—Breach—Taking down Party Wall—Absence of Permission—Notice to Repair, Specifying Breach—Sufficiency as Notice of Forfeiture under Landlord and Tenant's Act, sec. 13—Continuing Breach—Right of Re-entry—Relief against Forfeiture—Terms—Restoration of Wall—Specific Performance—Mandatory Order—Waste—Other Relief—Waiver—Receipt of Rent after Breach—Trustees—Notice Signed by one only—Sufficiency—Solicitor and Client Costs—Power of Court.*—The defendants were lessees from the plaintiffs of certain lands and premises. The defendants took down a portion of a party wall which was a part of the demised premises. This was done without the leave of the plaintiffs. On the 6th July, 1909, the plaintiffs served upon the defendants a

notice, which recited that the plaintiffs had entered the demised premises to examine the condition thereof and had found want of reparation, to wit, that openings had been made in the wall and part thereof had been demolished and removed, and had not been restored, and required the defendants "to well and sufficiently repair and make good the said want of reparation by well and sufficiently restoring said wall to its former condition and closing all openings therein within three calendar months next after the giving of this notice." On the 22nd October, 1909, without further notice, the plaintiffs began this action for possession, basing their claim on breaches of covenants in the lease. The lease contained a covenant to repair and a covenant to repair on three months' notice:—*Held*, assuming a breach of the covenant to repair, that the breach was a continuing one; that the notice given was not a complete waiver of that covenant; that, after the expiration of the time named in the notice—the repairs not having been made—the right of action for possession accrued; that a new notice was not necessary, the one given being sufficient under sec. 13 of the Landlord and Tenant's Act; but that the Court should, under sub-sec. 2 of sec. 13, relieve against the forfeiture, upon reasonable terms. — The premises demised consisted of a vacant lot and the party wall referred to, which was left standing after a fire which destroyed the buildings. New buildings were afterwards erected. The lease provided that the lessee should have "the right and liberty to maintain, continue, use, build, and

rebuild such wall:"—*Held*, that the removal and destruction of the wall was a breach of the covenant to repair, which, in its extended form, is, to "well and sufficiently repair, maintain, amend, and keep."—Review of the authorities.—*Held*, also, that the Court had no power to order payment by the defendants of the plaintiffs' costs as between solicitor and client: the plaintiffs were trustees, but the action was not in respect of the trust; and in an ordinary case payment of such costs can be ordered only as the price of an indulgence.—*Per MIDDLETON, J.*:—Restitution could not be ordered in specific performance of the covenant to repair.—*Per CLUTE, J.*:—Even if there was no forfeiture giving a right of re-entry, the plaintiffs would be entitled to relief, because waste had been committed of such a nature that a mandatory order to restore the wall would be the only sufficient and appropriate remedy; and also because, a sufficient notice to repair having been given, and the repairs not having been made within the time limited by the notice, a right of action arose, not only for forfeiture, but also, if forfeiture was not available, for other relief, and the appropriate remedy would be to restore the wall.—*Per CLUTE, J.*, also:—The receipt by the plaintiffs, after breach, of sums equivalent to rent, was not a waiver of the right of forfeiture, the receipt being expressly without prejudice to the plaintiffs' rights.—*Per CLUTE, J.*, also:—The notice, signed by one of the trustee-plaintiffs, and adopted by all, was sufficient.—Judgment of SUTHERLAND, J., varied. *Holman v. Knox*, 588.

## LEGACY.

See WILL.

## LIEN.

See MECHANICS' LIENS.

## LIMITATION OF ACTIONS.

*Recovery of Land—Possession—Evidence of Tenancy—Payment of Taxes—Recognition of Ownership—Mortgage—Registered Discharge—New Starting-point.*]—The plaintiff, desiring to provide his son with a home, purchased land, and mortgaged it. He let his son into possession, and the son remained in undisturbed possession from April, 1895, until April, 1907, after which his wife (the defendant) and child continued in possession until his death in April, 1908. The property was then rented by the plaintiff for a time, the rent being paid to the defendant; and, when the tenancy expired, the defendant resumed possession. During the whole period no rent was paid to the plaintiff, and he paid the interest on the mortgage and the taxes, the land being assessed to him as freeholder and to the son as tenant:—*Held*, that, when the son was let into possession, he became a tenant at will, and the right of entry to the plaintiff accrued at the expiration of one year thereafter. In such a case, the continuation of the possession is regarded as a tenancy at sufferance, unless evidence be given that a fresh tenancy has been created; a new tenancy at will is to be implied from acts and conduct of the parties which ought to satisfy a jury (or the Court) that there is such an agreement; and here the facts shewed that the plaintiff was from year to year recognised as the owner and the son as the

occupier or tenant—with the express assent and acceptance of the son; and, therefore, the plaintiff's right was not barred, under the Limitations Act, by the son's possession for ten years after the plaintiff's right of entry first accrued.—*Foster v. Emerson* (1854), 5 Gr. 135, followed.—*Keffer v. Keffer* (1877), 27 C.P. 257, distinguished.—*Held*, also, that, even if the son had acquired a title under the statute as against the plaintiff, the execution and registration, in 1911, of a discharge of the mortgage made by the father when he bought the land, gave a new starting-point to the statute.—*Henderson v. Henderson* (1896), 23 A.R. 577, *Lawlor v. Lawlor* (1882), 10 S.C.R. 194, and *Ludbrook v. Ludbrook*, [1901] 2 K.B. 96, followed.—Judgment of MULOCK, C.J. Ex.D., reversed. *Noble v. Noble*, 379.

#### **LIQUIDATED DAMAGES.**

See MECHANICS' LIENS.

#### **LIQUOR LICENSE ACT.**

See INTOXICATING LIQUORS — MUNICIPAL CORPORATIONS, 6, 7, 8.

#### **LOCAL OPTION BY-LAW.**

See MUNICIPAL CORPORATIONS, 6, 7, 8.

#### **LORD'S DAY ACT.**

See VENDOR AND PURCHASER, 1.

#### **MALICIOUS PROSECUTION.**

*Reasonable and Probable Cause*—*Belief of Defendant in Truth of Charge Laid*—*Question for Jury*—*New Trial*.]—In an action for malicious prosecution, the belief of the defendant in the truth of

the charge which he laid is a fact material to be considered in determining whether there was reasonable and probable cause for the prosecution; the state of the defendant's mind is a fact; and where the evidence, whether of one or more witnesses (including the defendant himself or otherwise), may lead to different conclusions as to his belief, it is not for the Judge but for the jury to say what the fact is. And, in this action, the question whether the defendant honestly believed in the truth of the charge which he laid against the plaintiff was, in the circumstances, which suggested want of such belief by the defendant, for the jury.—*Ford v. Canadian Express Co.* (1910-11), 21 O.L.R. 585, 24 O.L.R. 462, and *Longdon v. Bilsby* (1910), 22 O.L.R. 4, explained.—Judgment of the Judge of the County Court of the County of Ontario, in favour of the plaintiff, set aside, and a new trial ordered, the question of the defendant's belief not having been left to the jury. *Connors v. Reid*, 44.

#### **MANDAMUS.**

See MUNICIPAL CORPORATIONS, 6—SCHOOLS—SHERIFF.

#### **MANDATORY ORDER.**

See LANDLORD AND TENANT.

#### **MASTER AND SERVANT.**

See CONTRACT, 2—MINES AND MINERALS, 1.

#### **MECHANICS' LIENS.**

*Liability of Owner to Materialman*—*Building Contract*—*Contractor Failing to Complete Work in Due Time*—*Provisions of Contract*—*Allowance for Delay*—*Penalty or Liquidated Damages*—*Ex-*

*tinguishment of Balance Due to Contractor—Claim of Lien—Disallowance.*—A building contract, dated the 29th August, 1910, provided for the payment of \$6,700 in instalments to the contractor after the rate of 80 per cent. of the value of work and material every fourteen days as the work proceeded; also, that time should be of the essence of the contract, and the whole of the premises should be erected and completed internally so as to be in a fit and proper condition for commercial occupation and use within six weeks of the date of the contract, under a penalty of \$20 per day for every day the owner should be denied the full and proper use of the premises; and the contractor specially agreed to pay the owner the said sum of \$20 per day for every day the owner should be denied full possession of the premises, either directly from party to party, or as an allowance from any sum due or to be become due to the contractor. The building was not completed within the time agreed, and was never completed by the contractor. The contract-price had not been paid in full for the work done by the contractor:—*Held*, in an action by a material-man to enforce liens against the land, that, by reason of the penalty mentioned in the contract and the breach of the agreement on the part of the contractor, there was no sum "justly owing" or "payable," within the meaning of the Mechanics' and Wage-Earners' Lien Act, by the defendant the owner to the contractor, and the plaintiff was cut off from any relief under the Act.—*Farrell v. Gallagher* (1911), 23 O.L.R. 130, approved and followed.—*Held*,

also, that, notwithstanding the use of the word "penalty," the sum of \$20 a day was really liquidated damages.—Review of the authorities.—*Clydebank Engineering and Shipbuilding Co. v. Don José Ramos Yzquierdo y Castaneda*, [1905] A.C. 6, specially referred to.—Judgment of the Local Judge at North Bay affirmed. *McManus v. Rothchild*, 138.

## MINES AND MINERALS.

1. *Injury to Miner by Fall of Rock—Mining Act of Ontario, sec. 164, rule 17—Neglect to Provide "Suitable Pentice"—Covering of Shaft—Trap-door Left Open—Negligence—Statutory Liability of Owners of Mine—Master and Servant—Findings of Jury.*—The plaintiff, a miner, was injured by a rock falling down the shaft of a mine in which he was working for the defendants. The rock came through a man-hole situated above the mouth of the shaft, where men were engaged in "stopping," i.e., making an overhead excavation in the roof of the 300-foot level, below which was the shaft or winze in which the plaintiff was working. There was a trap-door over the mouth of the shaft or winze in which the plaintiff was, and this was open at the time of the accident. Before proceeding with the stopping, K., the workman in charge, sent his helper (C.) to see that the trap-door was closed, and C. called back that "everything was all right," upon which the stopping proceeded. K. said that it was C.'s duty, not only to see that the trap-door was closed, but to see that it remained closed while the stopping was going on. The trap-door, however,

was left open; if it had not been the plaintiff could not have been injured as he was. In an action at common law and under the Mining Act of Ontario to recover damages for the plaintiff's injuries, the jury found, in answer to questions: (1) that the plaintiff's injuries were caused by the negligence of the defendants; (2) "in not providing proper pentice over the man-hole into the stope." They also answered "yes" to question 3, "Did the defendants fail to provide a suitable pentice for the protection of workmen in the shaft in which the plaintiff was injured (as required by sub-sec. 17 of sec. 164 of the Mining Act of Ontario)?" They also negatived negligence or contributory negligence on the part of the plaintiff:—*Held* (MEREDITH, J.A., dissenting), that the plaintiff had established a good cause of action against the defendants for a breach of rule 17 of sec. 164; that there was reasonable evidence to support the findings of the jury; and that the findings were sufficient to warrant a judgment in the plaintiff's favour.—*Judgment of FALCONBRIDGE, C.J.K.B., affirmed.*—*Per GARROW, J.A.*:—The trap-door, if kept shut, would have been a "suitable pentice," in the language of rule 17, but when open was no pentice at all; and for the failure to keep it shut the defendants, and not the plaintiff, should suffer; the defence of common employment having no application in the case of a breach of a statutory duty.—*Per MEREDITH, J.A.*:—A "suitable pentice" is merely a suitable covering to save those below from things falling from above. The covering of the shaft was a perfect safeguard when the trap-

door was closed; the trap-door was necessary for the working of the mine. The negligence of C. in reporting to K. that the door was closed was the direct and immediate cause of the plaintiff's injury; and the action should have been brought against C., or against the defendants under the Workmen's Compensation for Injuries Act. *Siven v. Temsikaming Mining Co.*, 524.

2. *Mining Act of Ontario, 1908, sec. 78—Time for Performance of Work on Mining Claim—Commencement and Expiry of Periods*—"The Three Months Immediately Following the Recording"—*Restaking—Adoption of Staking of Former Holder of Claim—Failure to Shew Abandonment.*—*"The three months immediately following the recording,"* during which the recorded holder of a mining claim is to perform thirty days' work thereon, according to sec. 78 of the Mining Act of Ontario, 8 Edw. VII. ch. 21, begins to run, not on the day of the recording, but on the next day thereafter.—The disputant, who staked and recorded mining claims on the 7th September, 1909, and did the thirty days' work within the three months, but did not do the sixty days' work required by the statute to be done within the year following the expiration of the three months, restaked on the 7th December, 1910, deeming that the year had expired and that the land was open. The respondents staked the same claims on the 8th December:—*Held*, that both the restaking by the disputant and the staking by the respondents were properly disallowed by the Mining Commissioner—the former on the construction of the

statute; and the latter because the claims were not abandoned, and the respondents had no right to appropriate the stakes planted by the disputant and to adopt as their work the blazing of the lines by him. *Re Burns and Hall*, 168.

See DEED, 2.

### MISCONDUCT.

See CONTRACT, 2.

### MISREPRESENTATION.

See TRADE MARK.

### MISREPRESENTATION OF AUTHORITY.

See CONTRACT, 2.

### MORTGAGE.

*Power of Sale—Duty of Mortgagee—Sale at Fair Value—Conduct of Sale—Conditions—Withdrawal of Bid—Collusion between Mortgagee and Purchaser—Slight Evidence of.*]—The judgment of a Divisional Court, 23 O.L.R. 481, dismissing an action to set aside a sale of land under the powers of sale contained in certain mortgages, was affirmed. *Kaiserhof Hotel Co. v. Zuber*, 194.

See LIMITATION OF ACTIONS.

### MUNICIPAL CORPORATIONS.

1. *Application of Funds in Payment of Costs of Officer Incurred in Action against him—Class Action against Councillors to Recover Moneys Paid—Status of Plaintiff as Ratepayer—Tenant—Liability for Taxes—Breach of Trust—Trustee Act—Application of.*]—The plaintiff, suing as a ratepayer of a town, on behalf of himself and all other ratepayers, claimed from the defendants, who were the members of the town

council for the year 1911, a sum of money paid out of the funds of the town corporation, upon the vote of the defendants, to a firm of solicitors for a bill of costs incurred in defending the Chief Constable of the town in an action brought against him and the town corporation. The plaintiff's name was on the assessment slip for 1911 as one of the tenants of a property assessed to the landlord, as freeholder, and the tenants, as occupants; the total amount of taxes being \$15.75, apportioned as between the tenants. There was no proof that the tenants, as between them and the landlord, had to pay the taxes:—*Held*, that, in a class action such as this, the Court must ascertain by strict proof that the plaintiff has the interest which he alleges and upon which his title to sustain the suit is founded, i.e., as a member of a class standing in the same situation and having one common right and one common interest. — *Hichens v. Congreve* (1828), 4 Russ. 562, and *Clay v. Rufford* (1849), 8 Hare 281, followed.—And *held*, that the plaintiff was only contingently a ratepayer; for, without stipulation to the contrary, the law regards the landlord as the person to pay; and, if the tenant is called on, he can deduct the payment from his rent or be otherwise recouped by his landlord; and the plaintiff's status was of too vague and fugitive a character to justify his interference on behalf of the class.—*Dove v. Dove* (1868), 18 C.P. 424, followed.—*Quere*, as to the pertinence of the Trustee Act, 62 Vict. (2) ch. 15 (O.), to the case of municipal councillors applying municipal funds to the payment of the costs of the Chief Con-

stable of the municipality, in an action against him as an officer of justice acting in the enforcement of the Liquor License Act.—Judgment of DENTON, Jun. Co. C.J. York, affirmed. *Rockford v. Brown*, 206.

2. *Drainage—Township By-law Authorising Raising of Money to Pay for Work Done without By-law—Absence of Engineer's Report—Condition Precedent—Assessment—Municipal Drainage Act, sec. 77—Motion to Quash By-law—Discretion—Position of Applicant—Waiver—Estoppel.*]

—A by-law passed by a township council on the 26th September, 1910, purporting to be a by-law for the repair and maintenance of existing drainage works in the township and for borrowing a sum to complete the same, was not in fact intended to provide for the doing of any work under it, but was passed solely for the purpose of recouping the township corporation in respect of repairs and improvements already made and paid for by the council to an amount exceeding \$800, without a report from an engineer, a by-law, or an assessment:—*Held* (MEREDITH, J.A., dissenting), that the by-law must be quashed for illegality.—Order of the Drainage Referee reversed.—*Per* GARROW, J.A.:—Where proceedings for the original construction of a drain are instituted under the Municipal Drainage Act, they begin by a petition, followed by an engineer's report. Both are in the nature of conditions precedent, required to found jurisdiction in the council to charge and assess the lands in the drainage area for the expense of the work. If subsequent repairs are required, and the cost

exceeds \$800, they fall within sec. 77 of the Act, which, while dispensing with the petition required by sec. 3, expressly requires a report; and only when the council has received and formally adopted such a report may it undertake the work "specified in the report," for the doing of which the engineer is given all the powers to assess provided in respect of an original work. Section 89 implies an assessment lawfully made, upon the faith of which money has been advanced out of the general fund. There was no proper evidence of estoppel on the part of the appellant seeking to have the by-law quashed, even if estoppel could arise in respect of a statutory condition precedent conferring jurisdiction. The Court has a discretion on an application to quash a municipal by-law; but the discretion is a judicial one, not to be exercised arbitrarily; and there was nothing in the circumstances to justify the Court in exercising it in favour of the by-law.—*Per* MEREDITH, J.A.:—The appellant waived his right, as he might, to the proceedings not taken; and was estopped from seeking the unjust advantages which he was seeking in this proceeding.—*Township of McKillop v. Township of Logan* (1899), 29 S.C.R. 702, discussed. *Re Johnston and Township of Tilbury East*, 242.

3. *Erection of Bridge over Creek—Narrowing of Channel—Flooding Lands—Action Brought in High Court—Transference to Drainage Referee for Trial—Jurisdiction of Referee—No Question of Drainage Involved—9 Edw. VII. ch. 28, sec. 2—Municipal Drainage Act, 10 Edw. VII. ch.*



90—*Cause of Complaint — Time-limit for Making Claim — Improper Interference with Channel — Finding of Referee—Affirmance on Evidence — Damages — Depreciation in Selling Value of Land—Fear of Future Flooding.*—An action for damages for flooding the plaintiff's lands was begun on the 28th December, 1909, in the High Court. The action was set down for trial; and an order was made, by the Judge presiding at a sittings for the trial of actions, transferring the action for trial to the Drainage Referee. The order recited that it appeared that the action involved the question of drainage. It appeared, although not so stated on the face of the order, that the parties consented to it; and it was not moved against. The Referee tried the action, and determined it in favour of the plaintiff. Upon appeal from the judgment, the point was raised by the defendants that the Referee had no authority or jurisdiction to deal with the case under the order, because the case did not fall within the provisions of the Municipal Drainage Act, no question of drainage being involved, and the cause of complaint having arisen more than two years before the commencement of the action. The cause of the flooding was the erection by the defendants in 1907 of a bridge across a creek, which had the effect of narrowing its channel. The earliest flooding occurred on the 30th December, 1907, and the other floodings in the years 1908 and 1909:—*Held*, that the cause of complaint was not the building of the bridge, but the damage occasioned by the subsequent floods, and that was within two years before the commencement of the action; and

by the amendment to the Municipal Drainage Act, 9 Edw. VII. ch. 78, sec. 2, now sec. 99 of the Municipal Drainage Act, 10 Edw. VII. ch. 90, the Court or Judge is empowered to transfer an action, not only where it appears that the relief sought is properly the subject of proceedings under the Act, but where it appears that the action may be more conveniently tried before and disposed of by the Referee; and, therefore, the objection could not avail the defendants.—*McClure v. Township of Brooke* (1902), 5 O.L.R. 59, distinguished.—*Held*, also, that the finding of the Referee that there was an improper interference with the width of the channel of the creek, with the result that in times of freshet there was an interruption of the flow of the stream, which had the effect of flooding the plaintiff's lands, was in accordance with the great preponderance of the testimony, and should be affirmed.—*Held*, also, that the plaintiff was confined to such damage as properly and naturally resulted from each flooding; and the alleged depreciation in the selling value of the plaintiff's land, by reason of the fear of future flooding, was not comprised therein.—*West Leigh Colliery Co. v. Tunnicliffe & Hampson Limited*, [1908] A.C. 27, 29, followed.—Judgment of the Referee varied by reducing the amount of damages allowed by him. *Wigle v. Township of Gosfield South*, 646.

4. *Erection by Electric Power Company of Poles and Wires in Highways—Permission of Municipal Council—Necessity for—Opening of Highways—Approval—Designation of Places for Poles—Incorporating Act, 2 Edw. VII.*

ch. 107, secs. 12, 13, 21 (D.)—*Application of sec. 90 of Railway Act, 1888, and Amendment—Consistency.*—Section 90 of the Dominion Railway Act of 1888, 51 Vict. ch. 29, is, by sec. 21 of the Act incorporating the Toronto and Niagara Power Company, 2 Edw. VII. ch. 107 (D.), made applicable to that company and their undertakings, in so far as not inconsistent with the incorporating Act; and the sub-section added to sec. 90 by 62 & 63 Vict. ch. 37, requiring the consent of the municipal council having jurisdiction over a highway to the erection of poles and wires in such highway, and making the opening up of the highway for such purposes subject to the direction and approval of such person as the municipal council may appoint, and permitting the council to designate the places for the poles, is not inconsistent with secs. 12 and 13 nor with other provisions of the company's incorporating Act, and is to be read as part thereof; and the powers given by secs. 12 and 13 are to be exercised in conformity with the directions of sec. 90 as so amended (now sec. 247 of R.S.C. 1906, ch. 37), in so far as they relate to the construction and maintenance of lines for the conveyance of light, heat, power, and electricity upon or along highways, squares, or other public places.—Judgment of BOYD, C., 24 O.L.R. 537, reversed. *Toronto and Niagara Power Co. v. Town of North Toronto*, 475.

5. *Erection by Telephone Company of Poles and Wires on Bridge — Absence of Consent of Municipality—Notice—Direction of Officer — Trespass —*

*Remedy — Forum — Injunction*—43 Vict. ch. 67 (D.)—45 Vict. ch. 95 (D.)—*Railway Act, sec. 248 — Application to Bridge as Part of Highway.*—*Held*, that the Bell Telephone Company of Canada, the defendant, had not the right, without the consent of the municipality in the case of local lines, and without a week's notice or the direction of the municipality or its officer in the case of long-distance or trunk lines, to erect its poles and wires upon a bridge built by the Corporation of the County of Haldimand, the plaintiff, crossing the Grand river in the village of Cayuga; the bridge being a part of the highway.—The statutory power conferred upon the defendant by its Act of incorporation, 43 Vict. ch. 67 (D.), was modified by an amendment, 45 Vict. ch. 95, and both were superseded, in so far as the question in this case was concerned, by the provisions of sec. 248 of the Railway Act, R.S.C. 1906, ch. 37, which applies to bridges, notwithstanding that they are not specially mentioned in it, although mentioned in the incorporating Act.—*Held*, also, that the defendant, ever since it began the erection of poles and wires upon the bridge, was a trespasser; and the plaintiff was entitled to come to the Court for relief; and was not required to apply to the Board of Railway Commissioners; and the defendant should be enjoined from continuing to trespass.—Judgment of LATCHFORD, J., reversed. *County of Haldimand v. Bell Telephone Co. of Canada*, 467.

6. *Local Option By-law—Petition for Submission—Right of Petitioners to Withdraw Names—*

*Liquor License Act, sec. 141, and Amendments — Mandamus.*] — Where a petition in writing signed by twenty-five per cent. of the total number of persons appearing by the last revised voters' list of the municipality to be qualified to vote at municipal elections, is filed with the clerk of the municipality, on or before the 1st November, praying for the submission of a local option by-law (*Liquor License Act, R.S.O. 1897, ch. 245, sec. 141, amended by 6 Edw. VII. ch. 47, sec. 24, and 7 Edw. VII. ch. 46, sec. 11*), it is not open to any of the petitioners, after the 1st November, even before action by the municipal council, to withdraw their names. — *Halladay v. City of Ottawa* (1907), 14 O.L.R. 458, distinguished. — *Mandamus* to a township council to submit a by-law. *Re Keeling and Township of Brant*, 181.

7. *Local Option By-law—Voting on—Form of Ballot—Liquor License Act, sec. 141 (8)—Deviation Affecting Substance and Calculated to Mislead — Interpretation Act, sec. 7 (35)—Effect on Result—Municipal Act, sec. 204—Onus.*] — The form of ballot paper used for voting on a local option by-law was "For the By-law" and "Against the By-law," instead of "For Local Option" and "Against Local Option," as prescribed by sec. 141, sub-sec. 8, of the *Liquor License Act, R.S.O. 1897, ch. 245, as amended by 8 Edw. VII. ch. 54, sec. 10*. There was uncontradicted evidence that voters were confused and misled by the form of the ballot paper:—*Held*, that the by-law must be quashed. — *Re Giles and Town of Almonte* (1910), 21 O.L.R. 362, distinguished. — *Per Moss*,

C.J.O.:—Where it is shewn that a mistake was made in the use of the form or that there was a deviation from the form prescribed, it lies upon the party seeking to support what was done to make it appear that it was of such a nature as not to affect the substance of the voting or to be calculated to mislead (*Interpretation Act, sec. 7 (35)*) and did not affect the result (*Municipal Act, sec. 204*); and the contrary was shewn. — *Per MEREDITH, J.A.*:—The evidence put it beyond any reasonable doubt that the mistake did affect the substance, and was calculated to mislead, and may have affected, and probably did affect, the result. — Judgments of SUTHERLAND, J., and a Divisional Court, reversed. *Re Milne and Township of Thorold*, 420.

8. *Local Option By-law—Voting on — Scrutiny — Votes of Tenants — Residence — Finality of Voters' Lists—Voters' Lists Act, 7 Edw. VII. ch. 4, sec. 24 (2) —Vote of Person Disentitled by Non-residence—Inquiry as to how Ballot Marked—Municipal Act, 1903, sec. 200.*] — *Held*, reversing the judgment of MIDDLETON, J., 23 O.L.R. 598, that, upon a scrutiny, under the *Municipal Act*, of the votes cast at the voting upon a local option by-law, a County Court Judge has no right to declare void and deduct from the total of votes cast the vote of a tenant whose name was upon the certified voters' list, but who was not in fact a resident of the municipality when the list was certified, and who never afterwards became a resident therein: sec. 24 (2) of the *Voters' Lists Act, 7 Edw. VII. ch. 4*, has reference to a change of residence

after the list is certified.—Review of the authorities.—*In re Local Option By-law of the Township of Saltfleet* (1908), 16 O.L.R. 293, followed.—*Dictum* of GARROW, J.A., in *Re Ellis and Town of Renfrew* (1911), 23 O.L.R. 427, 435, not followed.—*Semble*, per TEETZEL, J., disagreeing with the opinion of MIDDLETON, J., that the County Court Judge has no power, upon a scrutiny, to inquire how any person who was not entitled to vote, marked his ballot; for that would be contrary to sec. 200 of the Municipal Act, 1903.—*Re Lincoln Election Petition* (1878), 4 A.R. 206, *Haldimand Dominion Election Case* (1888), 1 Ont. Elec. Cas. 529, *Rex ex rel. Ivison v. Irwin* (1902), 4 O.L.R. 192, and *Re Orangeville Local Option By-law* (1910), 20 O.L.R. 476, specially referred to. *Re West Lorne Scrutiny*, 267.

9. *Sale of Municipal Lands* — *City Hall Property* — *Market Place*—*Change of Site*—*Powers of Municipality*—*Authority to Sell*—1 Geo. V. ch. 95, sec. 10 (O.)—*Interpretation* — *Evidence*—*Draft Bill and Notices*—*Position of Council in Making Sale*—*Trustees* — *Precautions* — *Bona Fides* — *Reasonable Grounds.*] — Land purchased by the Corporation of the Town of London in 1852, for the purpose of enlarging the market place, was conveyed to the corporation in fee, no trust or purpose being indicated in the conveyances. In 1853, the town council changed their plan, and erected upon the front part of the land so purchased a town hall, at the same time using other land—purchased for a town hall site as well as to enlarge the market place—for market purposes only:

—*Semble*, that the change was within the municipal powers. — *Kennedy v. City of Toronto* (1886), 12 O.R. 211, specially referred to. —In January, 1911, a bank made an offer of \$100,000 for "the city hall property, having a frontage of 110 feet on Richmond street by a depth of 110 feet to the market square." This description included land to the rear of the city hall, which was in fact part of the market square, but had come to be regarded as city hall property:—*Held*, that the corporation were authorised by 1 Geo. V. ch. 95, sec. 10 (O.), to sell this land.—*Held*, also, that the draft of the bill upon which this Act was founded and the notices published were not admissible in evidence to aid in the interpretation of the Act. — The corporation contracted to sell the land to the bank at the price named; and in this action the sale was attacked as having been made by the city council, who were said to occupy a fiduciary position, without the observance of the precautions that ought to be taken by trustees:—*Held*, that all the rules of equity with reference to the conduct of trustees cannot be applied to a municipal council in the exercise of its statutory powers; and there is no warrant in law or in equity for the contention of the plaintiff, that, when the Legislature has said that these lands may be sold by the city corporation "at such price and upon such terms as the Council of the Corporation may deem expedient," the Court can add to this, "provided such sale is by public auction or by tender after due advertisement, and not in a private way, but only after adequate steps have been taken to ensure competition."—*Phillips*

v. *City of Belleville* (1905), 9 O.L.R. 732, and *Bowes v. City of Toronto* (1858), 11 Moo. P.C. 463, discussed.—And *held*, upon the evidence, that the sale was made in good faith, and the council not only had reasons which they might reasonably consider good and sufficient to justify their action, but acted with prudence, propriety, and wisdom; and, therefore, the sale should be upheld.—*Phillips v. City of Belleville* (1906), 11 O.L.R. 256, 259, followed. *Parsons v. City of London*, 172, 442.

See COSTS, 1 — SCHOOLS — SHERIFF — STREET RAILWAYS, 2.

#### NATURAL GAS.

See DEED, 2.

#### NECESSARIES.

See CRIMINAL LAW, 2.

#### NEGLIGENCE.

1. *Railway — Section - man Killed on Track—Train Running East upon North Track—Absence of Head-light in Fog — Rules of Company—Findings of Jury—Inference — Contributory Negligence.*—Early on a foggy morning in September, the plaintiff's husband, a section-man employed by the defendants, was working on the north track of the defendants' double-tracked line, when he was struck by an engine coming from the west upon the north track, and killed. He must have heard the engine approaching, but supposed that it was on the south track, which was the usual one for east-bound trains. In an action by his widow to recover damages for his death, the jury, in answer to questions submitted, found that the defendants had been negligent in: (1)

"neglecting to switch back train on to right line at Lyn;" (2) not carrying a head-light. The jury also found that there had been no contributory negligence; and they assessed the plaintiff's damages at a sum for which the trial Judge pronounced judgment in her favour, with costs:—*Held*, on appeal, that there was no proper evidence to support the first finding of negligence; but (MEREDITH, J.A., dissenting) that, as there was uncontradicted evidence that the engine had no head-light, as the defendants' rules provided that a train running when obscured by fog must display a head-light, as the jury might well infer that, if it had been displayed, it probably would have prevented the accident, as the point was, though not specially mentioned in the pleadings, submitted to the jury by the trial Judge, without objection, and was, in the circumstances, one proper for their consideration, and as there was evidence upon which the jury might well negative contributory negligence, judgment was properly given for the plaintiff.—*Per* MEREDITH, J.A.:—The jury may act upon proper presumptions of fact, but may not draw upon their imaginations, nor supply facts which ought to be proved under oath. The analogy of judicial notice obtains to some extent, but is limited to a few matters of elemental experience; and it is not in the category of elemental experience that in a dense fog in the daylight the head-light of an engine would have conveyed to the deceased the fact that the train was running on the east-bound track, in time to save him from his assurance that it was on the other track. There was not

a particle of evidence that the negligence of the defendants in running the train without a headlight was the cause of the accident; and there should be a new trial. *Graham v. Grand Trunk R.W. Co.*, 429.

2. *Street Railway — Injury to Passenger—Electric Explosion — Conduct of Motorman—Findings of Jury — Evidence — Inspection —Recollection of Witness—Written Report—Improper Rejection—New Trial.*]—The plaintiff was a passenger upon an electric street-car of the defendants, when an electric explosion occurred in the car, and the plaintiff was injured by being forced out of the car and thrown upon the ground by his panic-stricken fellow-passengers. In an action to recover damages for his injury, he alleged as negligence on the part of the defendants, among other things, that they had not properly inspected the controller. At the trial, which took place thirteen months after the explosion, the defendants called as a witness the foreman at one of their barns to shew that there had been a proper inspection. The witness could not, from memory alone, testify to an inspection shortly before the accident. Counsel for the defendants proposed to put into the witness's hands a report, signed by him in the usual course of his work, shewing that the car had been examined three days before the explosion. Upon objection by the plaintiff, the trial Judge ruled that the witness could not refresh his recollection by looking at the report, unless he had a recollection to refresh, which he did not profess to have; and, therefore, excluded the testimony. The jury found negli-

gence on the part of the defendants in that: (1) the motorman was incompetent to handle a car in case of emergency; (2) had he used the air-brake, the car could have been brought to a stop before the accident happened; and (3) that the car was not properly inspected; and judgment was entered for the plaintiff:—*Held*, upon appeal, that the testimony of the foreman was improperly rejected.—*Held*, also, *per MEREDITH, J.A.*, that the finding as to the incompetence of the motorman afforded, in itself, no cause of action; and that there was no reasonable evidence of negligence on the part of the motorman in failing to apply the brakes before seeking to reassure the passengers and to have the electric current cut off by the removal of the pole from the wire.—A new trial was directed. *Fleming v. Toronto R.W. Co.*, 317.

See **BILLS OF EXCHANGE — DAMAGES, 2, 3 — MINES AND MINERALS, 1 — PARTNERSHIP — RAILWAY—STREET RAILWAYS, 1.**

### NEW TRIAL.

See **MALICIOUS PROSECUTION— NEGLIGENCE, 2—PARTNERSHIP.**

### NOTICE OF ERECTION OF POLES AND WIRES.

See **MUNICIPAL CORPORATIONS, 5.**

### NOTICE OF FORFEITURE.

See **LANDLORD AND TENANT.**

### NOTICE TO REPAIR.

See **LANDLORD AND TENANT.**

### NUISANCE.

See **VENDOR AND PURCHASER, 3.**

**OIL LEASES.***See* CONTRACT, 1.**ONTARIO RAILWAY AND MUNICIPAL BOARD.***See* STREET RAILWAYS, 2.**PARENT AND CHILD.***See* INFANT.**PART PERFORMANCE.***See* CONTRACT, 2.**PARTIES.**

*Third Party Notice—Con. Rule 209—Time for Service—Extension under Con. Rule 353—Indemnity or Relief over—Warehousemen — Auctioneers—Principal and Agent — Damages — Scope and Application of Third Party Rules and Procedure.*—Goods which the defendants had carried for the plaintiff, having been in their possession for a long time, were handed over by the defendants to auctioneers to be sold to pay the defendants' charges. The auctioneers sold a part of the goods, which realised less than the amount of the charges. Some of the goods were delivered by the auctioneers, both before and after the sale, to the plaintiff's agent. The plaintiff alleged improper accounting and conversion, and claimed from the defendants a proper account of the goods sold, the value of the goods converted, or damages for the conversion. The defendants pleaded and counterclaimed; and, long after issue joined, the defendants obtained leave to serve and served upon the auctioneers a third party notice claiming indemnity or relief over:—*Held*, a proper case for a third party notice under Con. Rule 209.—*Held*, also, that, although the notice should have been served

within the time limited for the delivery of the defence (Con. Rule 209), there was power in the Court to extend the time (Con. Rule 353); and it should be extended, the plaintiff not objecting.—*Order of RIDDELL, J.*, affirmed.—*Per RIDDELL, J.* (after reviewing the Ontario cases):—Con. Rule 209 has been given too narrow an application; but, taking the tests laid down in *Gagne v. Rainy River Lumber Co.* (1910), 20 O.L.R. 433, there was in the present case the implied contract of the auctioneers with the defendants; and the damages, if any, recovered by the plaintiff from the defendants would be the measure of damages recoverable by the defendants from the auctioneers, their agents. It would be unfortunate if there were to be two trials by different tribunals of the same questions; and, as no possible harm could accrue to any one from allowing the third party notice to be served, the service should be allowed.—*Per BOYD, C.*:—The liberal provisions of Con. Rule 209 should be construed with a view to practical efficiency rather than to scientific accuracy.—*Per MIDDLETON, J.*:—The third party Rules are remedial, and should be freely applied to cases falling fairly within them. The right to invoke the third party procedure exists whenever the plaintiff's claim against the defendant, if successful, will result in the defendant having a claim against the third party to recover from him the damages which he has been compelled to pay to the plaintiff. The defendant must shew that he has a right to indemnity or relief over in respect of the plaintiff's recovery against him. The right of indemnity need not be for the

whole of the plaintiff's claim—it may be for any separate or separable part of the plaintiff's claim. Nor need this measure the full extent of the defendant's claim; it is enough if he can claim, *inter alia*, indemnity in respect of the plaintiff's recovery. The rights of parties to actions should not be disposed of upon summary applications to set aside third party notices. *Swale v. Canadian Pacific R.W. Co.*, 492.

See SHERIFF.

### PARTY WALL.

See LANDLORD AND TENANT.

### PARTNERSHIP.

*Operation of Thresher—Injury to Property of Partner—Contract—Breach—Damages—Negligence—Right of Partner against Partnership and Co-Partners—Contribution—Findings of Jury—Unsatisfactory Method of Arriving at Finding—New Trial.*] — The plaintiff and twenty-six other farmers purchased a "threshing machine outfit," with the intention of carrying on the business of threshing grain for farmers and others. It was not intended that each of them should be personally concerned in the actual work to be done. They chose from among themselves a board of management, adopted a firm name, and from time to time held meetings, at which directions were given with regard to the business. At one of these meetings, D. was appointed manager, and was authorised to transact the business of the firm in making engagements to thresh, conducting the work thereof, and controlling and supervising the machinery and its workings. It was contemplated that the mem-

bers of the firm would deal with the firm in providing for their own threshings; and it was part of the agreement that their threshings must be paid for at the same rates as those charged outside. It was not contemplated that each of the twenty-seven partners should, as between themselves, be endowed with full authority to act for the firm: the principal authority was delegated to the board and the manager acting under and authorised by it. The business was proceeded with under the management of D. The plaintiff, desiring to have his grain threshed, made arrangements with D., who undertook to do it in the usual course. The threshing outfit was taken to the plaintiff's farm and operated, D. being in charge of the engine, and G., a servant of the firm, in charge of the separator. The plaintiff took no part in the management or working of the outfit, and acted only as owner of the grain. While the work of threshing was proceeding, the plaintiff's barn took fire and was consumed, with other property. The plaintiff sued his twenty-six partners for the amount of his loss by fire. The jury found that the fire originated from defects in the smoke-stack of the engine; that their existence was due to D.'s negligence; and that he was aware of them:—*Held* (GARROW, J.A., dissenting), that, upon the facts and the findings of the jury (if they were to stand), the firm and the individual members were liable to make good to the plaintiff the loss and damage he had sustained, less his own contributory share; and that the judgment of MAGEE, J., 20 O.L.R. 559, ought not to be disturbed.—Save in so far, as against third



persons, the plaintiff was bound by the acts of the board of management and the manager, he was not responsible for placing D. in a position of control and management of the engine and its appliances, and he was not aware of the defects owing to which, as alleged, the fire occurred. In fact and in law, it was a fallacy to say that the firm's acts were the plaintiff's acts, and that D.'s negligence and knowledge were the plaintiff's negligence and knowledge. The plaintiff's loss arose in the course of the business, and not in the course of any service that he was individually receiving because he was a member of the firm; and for such a loss he should be recouped by the firm, just as others would be. The technical objection that, the firm not being a legal entity, the partner cannot be both plaintiff and defendant, and that, if he sues the firm, he is suing himself, has been removed in the case of promissory notes and the like, and there is no good reason why it should bar an action like the present.—But *held*, having regard to the evidence in support of the allegation that the fire arose from or was caused by the engine, and the more than hesitation expressed by the jury in regard to their affirmative answer to the question, "Were the barn and goods of the plaintiff burned by fire caused by sparks from the engine owned by the members of the syndicate?" and to what then took place with regard to it, that there should be a new trial upon this material part of the case; and, looking also at the nature of some of the other questions and answers, there should be a new trial generally,

if the defendants desired it; otherwise, the appeal from the judgment of *MAGEE, J.*, should be dismissed. — *Per GARROW, J.A.*:—The case was like that of a man suffering injury by the use of his own machine, under the management of his own servant. The servant, if negligent, may be liable, but not a co-owner or a co-partnership. The partners, however numerous, do not in law acquire that quality of a separate entity which would enable one partner to sue the firm, as a shareholder may sue his company. Such a liability must rest upon contract, express or implied, or upon a breach of duty—and nothing of the kind was shewn. Also, there is no reasonable warrant in the evidence to justify a finding that the plaintiff's damage was due to any negligence on the part of D. *Bigelow v. Powers*, 28.

See CONTRACT, 1.

#### PASSENGER.

See NEGLIGENCE, 2 — RAILWAY, 1, 2.

#### PENALTY.

See MECHANICS' LIENS.

#### PENTICE.

See MINES AND MINERALS, 1.

#### PERJURY.

See ARBITRATION AND AWARD.

#### PETITION.

See WILL, 3.

#### POWER OF SALE.

See MORTGAGE.

#### PRACTICE.

See APPEAL — COSTS — PARTIES—WILL, 3.

**PRESCRIPTION.**

See RAILWAY, 3.

**PRINCIPAL AND AGENT.**

*Agent's Commission on Sale of Land—Absence of Express Contract of Agency—Implied Promise—Taking Benefit of Plaintiff's Services—Parties Brought together by Agent's Intervention—Finding of Trial Judge—Appeal.*]—Where a claim is made for commission on a sale of land, slight service in bringing the parties together is sufficient; it is for the jury (or a Judge trying the case) to say whether the sale was or was not brought about by the agency of the plaintiff, by his introduction or intervention; and the test is, whether the sale has been brought about in consequence of the introduction, and is traceable thereto.—The plaintiff, who was a land agent, learned that B. would like to buy the defendant's land. The plaintiff told B. that he was an agent, and would see the defendant and find out the price. He did not go to buy the place for B. He saw the defendant, who told him to get an offer and he (the defendant) would consider it. The plaintiff prepared a written offer of \$7,000, which was signed by B., and in which the plaintiff's name was mentioned as agent. The plaintiff took this to the defendant, and the defendant had it in his possession for some days, while he was considering it, and in the end refused it, telling the plaintiff he wanted \$8,000, and he gave the plaintiff four days to get it. The plaintiff returned to B., but did not succeed in getting B. to give him another offer. B. himself went to the defendant within the four days and purchased at \$7,500. The defendant did not

admit speaking in any way to the plaintiff about commission; but it appeared that the defendant, when he told the plaintiff he wanted \$8,000, had in mind the payment of a commission to the defendant:—*Held* (RIDDELL, J., dissenting), that the plaintiff was entitled to commission on the sale-price.—Judgment of DENTON, Jun. Co.C.J. York, affirmed.—*Per* BOYD, C.:—There was no express bargain about commission, according to the evidence of both parties; but, on the plaintiff's evidence, there was proof that he was working upon an implied promise of compensation; and the defendant took the benefit of what was done by the plaintiff in preparing the way for the final sale; and the plaintiff's intervention efficiently furthered the completion of the transaction.—*Per* SUTHERLAND, J.:—The plaintiff proved facts from which it could be fairly and properly inferred that the defendant, knowing that the plaintiff was an agent, placed the property in his hands on an implied promise to pay him a commission if a sale were effected through his acts; and it was through the plaintiff and his activity in the matter that the purchaser was introduced to the defendant and the sale ultimately effected.—*Per* RIDDELL, J.:—The only contract of agency between the plaintiff and defendant was that created on their last interview, when the plaintiff said, "Bring me an offer of \$8,000 within four days, and I shall accept." The plaintiff shewed by his conduct that he so understood it; he made every effort to get B. to make an offer of \$8,000, but failed. Where the parties have made an express contract, the conditions under

which the remuneration becomes payable must be ascertained by the terms of the contract itself. There was no pretence that the plaintiff did procure the offer or could procure it. There was no fraud or bad faith on the part of defendant. *Singer v. Russell*, 444.

See CONTRACT, 2—INSURANCE, 2—PARTIES—VENDOR AND PURCHASER, 1, 2.

### PRIVY COUNCIL

See APPEAL.

### RAILWAY.

1. *Injury to Passenger—Special Contract for Carriage of Horse and Passenger—Exemption or Limitation of Liability of Company—Approval by Board of Railway Commissioners—Shipper of Animal—Privilege of Travelling at Reduced Rate—Railway Act, R.S.C. 1906, ch. 37, secs. 2 (31), 284, 340—“Impairing”—Knowledge of Passenger of Terms of Contract—Immateriality—“Traffic.”*—By the terms of a special contract, in a form approved by the Board of Railway Commissioners for Canada, it was agreed between the defendants and the plaintiff, a shipper of a horse by the defendants' railway, that the defendants, granting to the plaintiff, travelling on the train in which the horse was being carried, for the purpose of taking care of it, the privilege of travelling at a reduced fare, should “be entirely free from liability in respect of his death, injury, or damage,” whether caused by negligence or otherwise. The plaintiff, while so travelling, was injured, and brought this action to recover damages for his injury.—*Held*, by MULLOCK, C.J.

Ex.D., that the defendants were authorised to make the contract, and were thereby relieved from liability to the plaintiff.—Sections 284 and 340 of the Railway Act, R.S.C. 1906, ch. 37, considered.—The word “impairing” in sec. 340 is intended to cover the case of total exemption from liability.—*Held*, also, that it was immaterial whether the plaintiff, who signed the contract, had read it or knew its contents.—*Held*, by a Divisional Court, that by sec. 2 (31) of the Railway Act, “traffic” means the traffic of passengers, goods, and rolling stock; and the provision of the special contract in question in this case, entirely freeing the defendants from liability in respect of the death or injury of the passenger travelling in charge of a horse, both being carried under the one contract, was not a destruction of all liability under the contract, but a limitation to the goods carried; and this came within sec. 340 (2) of the Act; and upon this ground, the judgment of MULLOCK, C.J., was affirmed; RIDDELL, J., agreeing with the judgment as to the meaning of the word “impairing” in sec. 340 of the Act; and FALCONBRIDGE, C.J.K.B., not dissenting therefrom. *Heller v. Grand Trunk R.W. Co.*, 117, 488.

2. *Injury to Passengers' Baggage Lying at Station—Passengers not Travelling by Same Train—Liability of Railway Company—Gratuitous Bailees—Gross Negligence—Bailees for Reward—Warehousemen—Accident not Caused by Negligence—Onus—Evidence.*—Where passengers by railway checked their baggage on the day on which they purchased their tickets, but (without the

knowledge or fault of the railway company) did not begin their journey until the following day, and their baggage reached their destination before them, and was injured, by an accidental explosion, while in the baggage-room of the railway company, it was *held*, that the liability of the company was that of gratuitous bailees, *i.e.*, for gross negligence only.—Definition of “gross negligence.”—Review of the authorities.—And *held*, upon the evidence, that the company were not guilty of gross negligence.—*Semble*, also, that the company, if they were to be considered as bailees for reward — warehousemen—were not liable: they had discharged the onus of proving that the explosion was not due to negligence. *Carlisle v. Grand Trunk R.W. Co.*, 372.

3. *Severance of Farm — Undergrade Crossing — Agreement — Maintenance of Crossing—Right to Continuance—User for Twenty Years — Easement — Prescription.*—The judgment of CLUTE, J., 24 O.L.R. 206, was affirmed, on the ground that the plaintiffs’ right to an undergrade crossing had been established as an easement by continuous user for twenty years. *Leslie v. Pere Marquette R.W. Co.*, 326.

See NEGLIGENCE, 1 — STREET RAILWAYS.

### RATIFICATION.

See INSURANCE, 2—VENDOR AND PURCHASER, 1.

### REASONABLE AND PROBABLE CAUSE.

See MALICIOUS PROSECUTION.

### RELEASE.

*Action for Damages for Personal Injuries—Acceptance, before Action, of Sum of Money in Settlement of Claim for Injuries—Bar to Action—Absence of Fraud—Inadequacy — Improvidence — Advantage not Taken of Inequality or Incapacity.*—The plaintiffs, husband and wife, sued for damages arising from an injury to the wife in the defendants’ store, which, as she alleged, was caused by the negligence of the defendants or their servants. Before action, the plaintiffs made a settlement of their claim against the defendants with the defendants’ claims agent and were paid by the defendants the sum of \$50, and signed a receipt “in full of all claim re injuries.” When this settlement was made, the wife was in bed, and was said to be still suffering from her injuries. The defendants set this up as a release of the cause of action, and the plaintiffs replied that the execution of the pretended release was procured by misrepresentation and was executed without independent advice and without knowledge of its nature and effect. The action came on for trial before a Judge and jury. The issue as to the release was tried by the Judge alone and determined in favour of the defendants. The claim for damages based on the defendants’ negligence was then submitted to the jury, and a verdict given in favour of the woman plaintiff for \$750:—*Held*, upon the evidence, reversing the judgments of the trial Judge and a Divisional Court, that the settlement had not been brought about by intimidation or fraud or by imposition of any kind; and the release was a bar to the action.—*Per GAR-*

ROW, J.A.:—There was nothing to shew that the wife was so ill as to be unable understandingly to accept or reject the offer of \$50 made by the defendants. If the settlement was improvident, or the consideration inadequate, that alone was not sufficient to justify setting aside the settlement—the inadequacy not being so gross as to prove fraud or imposition. If there was inequality or incapacity of some kind, it did not appear that advantage was taken of the circumstance.—*Per* MEREDITH, J.A.:—There is no evidence of fraud in a claims agent dealing with a married woman, who has made a claim, even if she be in ill-health, and even if she has not a husband to help her. *Gissing v. T. Eaton Co.*, 50.

### RELIEF AGAINST FORFEITURE.

See LANDLORD AND TENANT.

### RELIEF OVER.

See PARTIES.

### RESERVATION.

See DEED, 2.

### RULES.

Con. Rule 209.]—See PARTIES.

Con. Rule 353.]—See PARTIES.

Con. Rule 832 (d).]—See APPEAL.

Con. Rule 938 (a).]—See WILL, 3.

### SALE OF LAND.

See MUNICIPAL CORPORATIONS—PRINCIPAL AND AGENT—VENDOR AND PURCHASER.

### SALE OF TIMBER.

See CONTRACT, 2.

### SCHOOLS.

*Township Continuation School—District Established by County Council—Application of School Board for Funds to Provide School House—By-law—Attempted Repeal—Powers of Council—Continuation Schools Act, 9 Edw. VII. ch. 90, secs. 5, 7 (3)—High Schools Act, 9 Edw. VII. ch. 91, sec. 38—Approval of Application—Finality—Mandamus—Demand and Refusal—Necessity for—Sufficiency—Application for Funds for Maintenance.]—The County Council of the County of Middlesex having, under the Continuation Schools Act, 9 Edw. VII. ch. 90, sec. 5, established the whole Township of West Nissouri as a continuation school district, and the continuation school board having made an application to the township council to issue debentures for the purpose of raising \$7,000 for the purchase of a school site and the erection of a school house, the township council passed a by-law providing for raising \$7,000 by debentures. The council afterwards assumed to repeal this by-law by another by-law:—*Held*, that the council, by the first by-law, had approved the application, under the provisions of 9 Edw. VII. ch. 91, sec. 38 (made applicable to continuation schools by sec. 7 (3) of the Continuation Schools Act), and had no power to change or reverse that approval; and it then became the duty of the council, under sec. 38 (4), to raise the sum required.—*Held*, however, that a mandamus to the council to raise and pay over the \$7,000 to the school board could not be granted, because it was not shewn that a proper demand had been made by the board and re-*

fused by the council.—Order of MIDDLETON, J., reversed and motion for mandamus dismissed, but without prejudice to another application, after formal demand.—The council assumed to repeal the first by-law because the reeve and most of the councillors believed that they were elected to oppose the establishment of a continuation school:—*Semble, per MIDDLETON, J.*, that this was an improper attitude on the part of the township council, for they had no power to review the action of the county council; but, *per RIDDELL, J.*, that there was no impropriety in raising such an issue at a municipal election, or in making the attitude of a candidate upon that issue the test of whether he should be voted for; the people were to pay for a school, if established, and they had a right to express their views by their votes, if they saw fit; and the council had a right to do all they could lawfully to carry out the mandate of their constituents.—A document, under the seal of the school board, and signed by the chairman and secretary-treasurer, was served upon the township council, demanding \$1,000 for the maintenance of the school. Later, the chairman and other members of the board attended a meeting of the council and urged the council to raise and pay over the \$1,000 to the board. Another demand was subsequently made at a meeting of the council by a member of the board acting for the board, and he was then (as he said) “told by the reeve, in the presence of the councillors, that we could go to the Courts and get our money:”—*Held*, that, upon this application, there was a sufficient demand and refusal,

and the board were entitled to a mandamus for payment of the \$1,000.—All that is necessary in order that a mandamus may issue is to satisfy the Court that the party complained of has distinctly determined not to do what is demanded.—Order of MIDDLETON, J., affirmed. *Re West Nissouri Continuation School*, 550.

### SCRUTINY.

See MUNICIPAL CORPORATIONS, 8.

### SECURITY FOR COSTS.

See COSTS, 1.

### SETTLEMENT.

See RELEASE.

### SHARES.

See COMPANY—DAMAGES, 1—WILL, 5.

### SHERIFF.

*Criminal Justice Returns—Fees—Liability of County Corporation—10 Edw. VII. ch. 41 (O).—Return Transmitted through the Sheriff—Report Made in Duplicate—Remedy of Sheriff—Mandamus to County Board of Audit—Parties—Attorney-General.*—The Board of Audit of the United Counties refused to pass certain items in the account of the Sheriff for services rendered in making monthly returns to the Inspector of Prisons and Public Charities of insane persons in gaol and foreigners in gaol, annual returns of foreigners committed to gaol, quarterly returns of supplies in gaol, and quarterly returns to the Counties Treasurer of prisoners in gaol:—*Held*, that these were returns made to the Government, connected with the administration of criminal justice, within

the meaning of the Act 10 Edw. VII. ch. 41 (O.); and the Sheriff was entitled to be paid, for his services in making them, the fees set out in the schedule to that Act.—History of the legislation.—Any return which, to make it official, is transmitted through the Sheriff, is a return for which the Sheriff is entitled to be paid; but a report required to be made in duplicate is but one report, and is to be paid for as one.—*Held*, also, that the Sheriff was entitled to a mandamus requiring the Board of Audit to pass his account.—*Semble*, that the Attorney-General was not a necessary party to the proceedings in respect of the application for a mandamus, but it would not be improper that he should be notified of the proceedings.—Order of BRITTON, J., affirmed. *Re Mack and Board of Audit of the United Counties of Stormont Dundas and Glengarry*, 121.

### SOLICITOR.

*See* ARBITRATION AND AWARD.

### SPECIFIC PERFORMANCE.

*See* LANDLORD AND TENANT.

### STATUTE OF FRAUDS.

*See* CONTRACT, 1, 2—VENDOR AND PURCHASER, 1, 2.

### STATUTE OF LIMITATIONS.

*See* LIMITATION OF ACTIONS.

### STATUTES (CONSTRUCTION OF).

*See* APPEAL—CRIMINAL LAW, 1—MUNICIPAL CORPORATIONS, 4, 5, 6, 7, 9—STREET RAILWAYS, 2.

### STATUTES (REFERRED TO).

43 Vict. ch. 67 (D.) (Incorporating Bell Telephone Company of Canada).

*See* MUNICIPAL CORPORATIONS, 5.

45 Vict. ch. 95 (D.) (Amending the Bell Telephone Company's Act).

*See* MUNICIPAL CORPORATIONS, 5.

51 Vict. ch. 29, sec. 90 (D.) (Railway Act).

*See* MUNICIPAL CORPORATIONS, 4.

R.S.O. 1897, ch. 32, sec. 3 (1), (3) (Crown Timber Act).

*See* CONTRACT, 2.

R.S.O. 1897, ch. 51, sec. 119 (Judicature Act).

*See* COSTS, 1.

R.S.O. 1897, ch. 62, secs. 3, 45 (Arbitrations Act).

*See* ARBITRATION AND AWARD.

R.S.O. 1897, ch. 129, sec. 39 (1) (Trustee Act).

*See* WILL, 3.

R.S.O. 1897, ch. 170, sec. 13 (Landlord and Tenant Act).

*See* LANDLORD AND TENANT.

R.S.O. 1897, ch. 181 (Surveys Act).

*See* DEED.

R.S.O. 1897, ch. 245, sec. 122 (Liquor License Act).

*See* INTOXICATING LIQUORS.

R.S.O. 1897, ch. 245, sec. 141 (Liquor License Act).

*See* MUNICIPAL CORPORATIONS, 6.

R.S.O. 1897, ch. 245, sec. 141, sub-sec. 8 (Liquor License Act).

*See* MUNICIPAL CORPORATIONS, 7.

62 Vict. (2) ch. 15 (O.) (Trustee Act).

*See* MUNICIPAL CORPORATIONS, 1.

62 & 63 Vict. ch. 37 (D.) (Amending Railway Act).

*See* MUNICIPAL CORPORATIONS, 4.

63 Vict. ch. 103 (O.) (Town of Toronto Junction and Toronto Railway Company).

*See* STREET RAILWAYS, 2.

2 Edw. VII. ch. 107, sec. 12, 13, 21 (D.) (Incorporating Toronto and Niagara Power Company).

*See* MUNICIPAL CORPORATIONS, 4.

3 Edw. VII. ch. 19, sec. 200 (O.) (Municipal Act).

*See* MUNICIPAL CORPORATIONS, 8.

3 Edw. VII. ch. 19, sec. 204 (O.) (Municipal Act).

*See* MUNICIPAL CORPORATIONS, 7.

3 Edw. VII. ch. 19, sec. 378, sub-secs. 4, 5, 6 (O.) (Municipal Act).

*See* COSTS, 1.

R.S.C. 1906, ch. 37, secs. 2 (31), 284, 340 (Railway Act).

*See* RAILWAY, 1.

R.S.C. 1906, ch. 37, sec. 247 (Railway Act).

*See* MUNICIPAL CORPORATIONS, 4.

R.S.C. 1906, ch. 37, sec. 248 (Railway Act).

*See* MUNICIPAL CORPORATIONS, 5.

- R.S.C. 1906, ch. 119, secs. 127, 167 (Bills of Exchange Act).  
*See* GIFT.
- R.S.C. 1906, ch. 146, sec. 238 (a) (Criminal Code).  
*See* CRIMINAL LAW, 3.
- R.S.C. 1906, ch. 146, sec. 242 (2) (Criminal Code).  
*See* CRIMINAL LAW, 2.
- 6 Edw. VII. ch. 30, secs. 2 (21), 164 (O.) (Railway Act).  
*See* STREET RAILWAYS, 2.
- 6 Edw. VII. ch. 47, sec. 24 (O.) (Amending Liquor License Act).  
*See* MUNICIPAL CORPORATIONS, 6.
- 7 Edw. VII. ch. 2, sec. 7 (35) (O.) (Interpretation Act).  
*See* MUNICIPAL CORPORATIONS, 7.
- 7 Edw. VII. ch. 4, sec. 24 (2) (O.) (Voters' Lists Act).  
*See* MUNICIPAL CORPORATIONS, 8.
- 7 Edw. VII. ch. 46, sec. 11 (O.) (Amending Liquor License Act).  
*See* MUNICIPAL CORPORATIONS, 6.
- 7 & 8 Edw. VII. ch. 30, sec. 11 (D.) (Gold and Silver Marking Act).  
*See* CRIMINAL LAW, 1.
- 8 Edw. VII. ch. 21, sec. 78 (O.) (Mining Act).  
*See* MINES AND MINERALS, 2.
- 8 Edw. VII. ch. 21, sec. 164, rule 17 (O.).  
*See* MINES AND MINERALS, 1.
- 8 Edw. VII. ch. 54, sec. 10 (O.) (Amending Liquor License Act).  
*See* MUNICIPAL CORPORATIONS, 7.
- 9 Edw. VII. ch. 35 (O.) (Arbitration Act).  
*See* SURROGATE COURTS.
- 9 Edw. VII. ch. 78, sec. 2 (O.) (Amending Municipal Drainage Act).  
*See* MUNICIPAL CORPORATIONS, 3.
- 9 Edw. VII. ch. 90, secs. 5, 7 (3) (O.) (Continuation Schools Act).  
*See* SCHOOLS.
- 9 Edw. VII. ch. 91, sec. 38 (O.) (High Schools Act).  
*See* SCHOOLS.
- 10 Edw. VII. ch. 24, secs. 3, 4, 5 (O.) (Privy Council Appeals Act).  
*See* APPEAL.
- 10 Edw. VII. ch. 31, sec. 69 (O.) (Surrogate Courts Act).  
*See* SURROGATE COURTS.
- 10 Edw. VII. ch. 41 (O.) (Administration of Justice Expenses Act).  
*See* SHERIFF.
- 10 Edw. VII. ch. 69 (O.) (Mechanics and Wage-Earners Lien Act).  
*See* MECHANICS' LIENS.
- 10 Edw. VII. ch. 83 (O.) (Ontario Railway and Municipal Board Amendment Act).  
*See* STREET RAILWAYS, 2.
- 10 Edw. VII. ch. 90, secs. 3, 77, 89 (O.) (Municipal Drainage Act).  
*See* MUNICIPAL CORPORATIONS, 2.
- 10 Edw. VII. ch. 90, sec. 99 (O.) (Municipal Drainage Act).  
*See* MUNICIPAL CORPORATIONS, 3.
- 1 Geo. V. ch. 18 (O.) (Amending Surrogate Courts Act).  
*See* SURROGATE COURTS.
- 1 Geo. V. ch. 42 (Surveys Act).  
*See* DEED.
- 1 Geo. V. ch. 57, sec. 37 (O.) (Wills Act).  
*See* WILL, 2.
- 1 Geo. V. ch. 95, sec. 10 (O.) (City of London Act).  
*See* MUNICIPAL CORPORATIONS, 9.

## STAY OF EXECUTION.

*See* APPEAL.

## STREET RAILWAYS.

1. *Injury to Person Crossing Track — Negligence — Contributory Negligence — Ultimate Negligence — Findings of Jury.*—*Held*, reversing the judgment of a Divisional Court, 23 O.L.R. 331, that there was no reasonable evidence to support such of the findings of the jury as were in favour of the plaintiff; and the action was properly dismissed by RIDDELL, J. *Jones v. Toronto and York Radial R.W. Co.*, 158.

2. *Jurisdiction of Ontario Railway and Municipal Board — Order for Repair and Renewal of Tracks — Agreements with Municipality — Construction — "Construct," Meaning of — Dangerous Condition of Tracks — Ontario and Municipal Board Act, 1906, secs. 63, 64 — Ontario Railway Act, 1906, secs. 2 (21), 164 — Ontario and Municipal Board Amendment Act, 1910 — Application to Pending Proceedings.*—*Held*, that the Ontario Railway and Municipal Board had power, under secs. 63 and 64 of the Ontario Railway and Municipal Board Act, 1906, to make an order requiring the



Toronto Railway Company to repair, renew, and restore to a suitable and satisfactory condition the tracks and substructure in use upon a certain street in the city of Toronto, formerly in the town of Toronto Junction, over which the company operated its tracks; and there was jurisdiction to make the order notwithstanding the absence from the record of the Toronto Suburban Street Railway Company.—Construction of the agreement between the Corporation of the Town of Toronto Junction and the Toronto Suburban Street Railway Company, of the 11th November, 1899, validated and confirmed by 63 Vict. ch. 103 (O.) and set out in schedule B. thereto; and of the agreement between the Corporation of the Town of Toronto Junction, the Toronto Railway Company, and the Toronto Suburban Street Railway Company, of the 6th October, 1899, validated and confirmed by the same statute, and set out in schedule D. — “Construct,” in clause 12 of the first-mentioned agreement, requiring the company to construct the tracks and superstructure according to the best modern practice from time to time in general use, is not confined to original construction, but includes necessary reconstruction—the meaning is “construct from time to time” or “construct and maintain.”—*Held*, also, that the railway was a street railway, within sec. 2 (21) of the Ontario Railway Act, 1906; sec. 164, which provides for the case of a railway becoming dangerous from lack of repairs or renewals, applies to street railways; and the Board had power, under that Act, to deal with such a situation—that is, of

danger to the public—independently of the agreements between the municipality and the railway company.—*Semble*, also, that the Ontario Railway and Municipal Board Amendment Act, 1910, passed while the proceedings before the Board were pending, but before the hearing, under which the powers of the Board were enlarged, also applied—the effect of certain sections of the new Act being to modify the general rule that pending proceedings are not to be affected by new legislation. *Re City of West Toronto and Toronto R.W. Co.*, 9.

See INSURANCE, 1 — NEGLIGENCE, 2.

### SUNDAY.

See VENDOR AND PURCHASER, 1.

### SURROGATE COURTS.

*Jurisdiction—Surrogate Courts Act*, 10 Edw. VII. ch. 31, sec. 69—*Claim or Demand*—*Claim to Establish Donatio Mortis Causæ—Amount of Money Involved*—1 Geo. V. ch. 18—*Judge Adjudicating by Consent—Private Tribunal—Quasi-Arbitrator—Appeal from Award—Forum—Arbitration Act—Finding of Arbitrator—Credibility and Demeanour of Witnesses—Refusal to Interfere.*—Section 69 of the Surrogate Courts Act, 10 Edw. VII. ch. 31, does not confer power on the Judge of a Surrogate Court to adjudicate upon a claim to moneys of a deceased person under an alleged *donatio mortis causæ*: the “claim or demand” referred to in sub-sec. 1 is a claim or demand against the estate by a “creditor.”—Where the Judge of a Surrogate Court, by consent of the claimant and of the administrators of the estate of an

intestate, heard evidence and adjudicated upon a claim of a person seeking to establish a *donatio mortis causæ* in respect of moneys deposited in a savings bank to the credit of the intestate:—*Held*, that the Judge had no jurisdiction as such, both because sec. 69 did not apply to such a claim, and because the amount involved was more than \$800 (1 Geo. V. ch. 18); and the consent could not confer jurisdiction upon the Judge to adjudicate as such; but his decision should be regarded as that of a quasi-arbitrator or private tribunal constituted by the parties; and, a right of appeal having been reserved by the consent under which he acted, an appeal lay from his decision, as from an award, to a Judge of the High Court, under the Arbitration Act, 9 Edw. VII. ch. 35.—*Seem*, that, if there had been jurisdiction under sec. 69 of the Surrogate Courts Act, there would have been a right of appeal from the decision upon the claim to a Judge of the High Court, under 1 Geo. V. ch. 18, sec. 3.—*And held*, upon the merits, that the Court should not reverse the finding of the Judge or arbitrator against the claim; he having discredited, on account of their demeanour in the witness-box, the claimant and her daughter, whose testimony was in conflict with evidence adduced for the administrators, which he believed; and it not appearing from the judgment or the evidence that he had misapprehended the effect of the evidence or failed to consider a material part of it.—*Coghlan v. Cumberland*, [1898] 1 Ch. 704, followed.—*Beal v. Michigan Central R.R. Co.* (1909), 19 O.L.R. 502, distinguished. *Re Graham*, 5.

## SURVEYS ACT.

*See* DEED, 1.

## TELEPHONE COMPANY.

*See* MUNICIPAL CORPORATIONS, 5.

## THIRD PARTIES.

*See* PARTIES.

## TIMBER.

*See* CONTRACT, 2.

## TIME.

*See* ARBITRATION AND AWARD — MINES AND MINERALS, 2 — MUNICIPAL CORPORATIONS, 3 — PARTIES.

## TRADE MARK.

"Gold Medal" — *Undescriptive Words* — *Secondary Meaning* — *Unregistered Mark* — *Passing-off Goods* — *Action to Restrain* — *Onus* — *Right of Plaintiffs to Use of Words* — *Misrepresentation*.]—In an action to restrain the defendants from passing off their flour as the plaintiffs' by the sale of it in bags impressed with the unregistered trade mark "Gold Medal," which had been used by the plaintiffs for many years:—*Held*, assuming the plaintiffs' right to use the words "Gold Medal," that they had not satisfied the onus which was upon them of shewing that the defendants had sought to palm off their flour as the flour of the plaintiffs, and of shewing that the words had acquired a technical and superinduced meaning distinct from the natural one and applicable only to the particular flour sold by the plaintiffs. — *Cellular Clothing Co. v. Maxton & Murray*, [1899] A.C. 326, specially referred to.—*Seem*, that, if there was no foundation in fact for the use by the plaintiffs of the words

"Gold Medal," such as that they had gained a prize for their flour at some exhibition or competition, the plaintiffs would be outlawed for misrepresentation. *Dominion Flour Mills Co. v. Morris*, 561.

### TRAFFIC.

See RAILWAY, 1.

### TRESPASS.

See MUNICIPAL CORPORATIONS, 5.

### TRUSTS AND TRUSTEES.

See COMPANY, 1—LANDLORD AND TENANT—MUNICIPAL CORPORATIONS, 1, 9—WILL, 5, 6.

### ULTIMATE NEGLIGENCE.

See STREET RAILWAYS, 1.

### VAGRANCY.

See CRIMINAL LAW, 3.

### VENDOR AND PURCHASER.

1. *Contract for Sale of Land—Authority of Agent—Ratification—Formation of Contract—Statute of Frauds—Offer or Option—Receipts—Letters—Memorandum Contained in Different Documents—Incorporation by Reference—Parol Evidence—Identification of Subject-matter—Receipt Signed on Sunday—Subsequent Completion of Contract—Lord's Day Act.*]—The particulars required to make a complete memorandum, for the purposes of the Statute of Frauds, of an agreement for the sale and purchase of land, need not all be contained in one document; the signed document may incorporate others by reference. — What is a sufficient reference for this purpose, considered.—The rule laid down in the earlier cases, such as *Boydell v. Drummond* (1809), 11 East 142, that "the

reference must appear from the writing itself and not have to be made out by oral evidence," has been relaxed in the later cases.—Review of the authorities.—The defendant placed land in the hands of an agent for sale. On the 9th May, 1911, the agent wrote to the plaintiff's husband in reference to the land, describing it as "156 feet on Bloor St.," mentioning the price per foot frontage, and the terms of payment. He did not name the plaintiff as vendor, but referred to him as "my client." On the 14th May, the plaintiff's husband and the agent agreed upon a sale at the price named, and the former paid \$5 to the agent, who gave him his signed receipt therefor, "re option on the Mr. Dawson land north west of Bloor Willard." The 14th May was a Sunday. On the next day, the agent told the defendant what he had done, and the defendant said he would let the sale go through; and on that day the plaintiff's husband paid \$25 to the defendant, who gave him a signed receipt for \$30 "to apply on purchase of lots 1, 2, and 3 L.M. estate on Bloor St. West (lots on N.W. corner of Bloor & Willard Sts.)" There were subsequent letters between the plaintiff's solicitors and the defendant, the letters of the defendant referring to "the lots to be transferred," describing them, and explaining that he held them under an agreement with L. M., and referring also to the "agreement" with the plaintiff's husband:—*Held*, that the defendant's action on the day after the payment of \$5 was made amounted to a ratification of what the agent had assumed to do, even if the agent was not authorised to enter into

a contract of sale.—*Held*, also, that the agent's letter of the 9th May, if not in itself an offer to sell on the terms mentioned in it, was treated as such by both parties, as the agent's receipt shewed, and they were at liberty so to treat it; and by it, upon the plaintiff's husband's verbal acceptance, and the defendant's ratification, the defendant was bound.—*Held*, also, that the reference in the receipt given by the defendant to the purchase of the described lots was to the option contained in the agent's letter and his receipt; and, as the parol evidence shewed that the only purchase that had been arranged or agreed to was that evidenced by the agent's letter and receipt, these, with the defendant's receipt, and at all events together with his subsequent letters, contained all the essentials of a memorandum sufficient to satisfy the Statute of Frauds.—*Semble*, that, if the agent's letter and receipt had been the only writings, a contract sufficiently evidenced to satisfy the statute would not have been made out; for neither of these documents mentioned the vendor, and the reference to "my client" was not sufficient. — *Clergue v. Preston* (1904), 8 O.L.R. 94, distinguished.—*Held*, also, that the subject-matter of the contract was sufficiently identified.—*Held*, also, that the contract was not void under the Lord's Day Act, because, although the agent's receipt was signed on a Sunday, there was no completed contract until the following day. *Bailey v. Dawson*, 387.

2. *Contract for Sale of Land — Authority of Agent of Vendor to*

*Make—Receipt Signed by Agent in his own Name—Memorandum in Writing to Satisfy Statute of Frauds—Name of Principal not Disclosed — Different Documents Relating to Same Transaction to be Read as One—Terms of Sale—Names of Vendor and Purchaser—Signature by Initials in Body of Document.]—*Authority to an agent to sell land gives authority to sign a binding contract for sale.—Review of the authorities.—A memorandum in writing may be sufficient to satisfy the Statute of Frauds, sec. 4, although it does not disclose the name of the real vendor, the principal, if it discloses the name of the agent who has authority to bind the vendor.—Review of the authorities.—The defendant's title to the land in question was under the K. agreement to purchase, upon which there was a balance of unpaid purchase-money, the defendant's "equity" being worth about \$1,000. An estate agent drew the plaintiff's attention to the land, and got him to make an offer. The agent then saw the defendant and told him that he had a purchaser, naming the offer. The agent and the defendant discussed the terms, and afterwards the defendant told the agent that he would sell on the terms proposed; and the agent then said that, if he could sell on those terms, he would do so without consulting the defendant further, and the defendant said that that was satisfactory. The plaintiff told the agent that he would take the property on those terms; and the agent then told the defendant that he had sold the property, and the defendant said "all right." The agent then received \$200 from the plaintiff, and gave him a written receipt therefor,

signed by himself (the agent), expressed to be "account purchase" of the land, describing it, stating the purchase-price, the terms of payment, and the rate of interest upon deferred instalments. In setting out the terms, the words "balance of equity about \$1,000 equally on Dec. 11 and June 12" were used. The vendor's name was not mentioned in the receipt, but the agent, at the same time that he wrote the receipt, wrote on the stub thereof the vendor's name with certain other particulars. The defendant made a contemporaneous entry in his pass-book of a sale to the agent at the same price and on the same terms as those mentioned in the receipt, using in one place the words, "balance of O'B. equity payments Dec. and June"—O'B. being the initials of the defendant's name:—*Held*, that the agent had authority to sell and to sign a binding contract for sale, and that the receipt alone was a memorandum sufficient to satisfy the Statute of Frauds.—*Semble*, that certain figures set down on paper at the interview between the agent and the defendant, the receipt given by the agent, and the entry made by the defendant, all related to the same transaction, and might all be read together.—*Semble*, also, that the receipt and the memorandum on the stub should be read as one, and would constitute a memorandum giving the names of both vendor and purchaser.—*Semble*, also, that the initials appearing in the body of the entry made by the defendant was a sufficient signature by him. *Maybury v. O'Brien*, 229.

### 3. Contract for Sale of Land—

49—xxv. O.L.B.

*Building Restrictions — Covenant — Construction — "Detached House"— Use for "Residential Purposes"—Purposes of "Trade"—Apartment House — Letting in Suites — Nuisance.*—The vendor's title was derived through a conveyance which contained a covenant on the part of the grantees that every residence erected on the land should be a detached house, that the land should be used for residential purposes only, and that no building erected on any part of the land should be used for the purposes of any profession, business, trade, or employment, save and except that of a duly qualified physician or dentist, or for any other purpose whatsoever which might be deemed a nuisance. By the terms of the vendor's contract of sale, the land was to be subject to certain building restrictions, in part as follows: "No attached or semi-detached house shall be permitted, and one detached three - suite dwelling-house, and no more . . . . No such building . . . . shall be used . . . . for the purpose of any profession (save of a duly qualified doctor or dentist), business, trade, or employment, or for any purpose which might be deemed a nuisance, but may be only used for residential purposes." A "detached three-suite dwelling-house" was understood to mean, a detached dwelling-house divided into three suites of apartments, each of which was to be separately let and occupied, with but one front door and a common entrance and staircase leading to the suites:—*Held*, upon an application by the purchaser under the Vendors and Purchasers Act, that the use of such a house by letting it in suites for

separate occupation could not be deemed a nuisance.—2. That, in order to ascertain the scope and effect of the covenant, regard was to be had to the object which it was designed to accomplish; and the language used was to be read in an ordinary or popular, and not in a legal and technical, sense.—3. That the use of the house for the purpose for which it was designed, would be a use for residential purposes, and not for the purpose of a business or trade, within the meaning of the covenant. Letting the suites separately would not be carrying on a trade.—4. That the dwelling-house which the purchaser was to be permitted to erect would constitute one residence only — a detached house — and none the less so because the suites into which it was to be divided were to be separately let and separately occupied.—*Held*, therefore, that neither the erection of the proposed three-suite dwelling-house nor its use for the purposes for which it was designed would constitute a breach of the covenant.—Review of the authorities.—*Rogers v. Hosegood*, [1900] 2 Ch. 388, specially considered and explained. *Re Robertson and Defoe*, 286.

See CONTRACT, 2—MORTGAGE—PRINCIPAL AND AGENT.

### VOTING.

See MUNICIPAL CORPORATIONS, 7, 8.

### WAIVER.

See LANDLORD AND TENANT—MUNICIPAL CORPORATIONS, 2.

### WAREHOUSEMEN.

See PARTIES—RAILWAY, 2.

### WASTE.

See LANDLORD AND TENANT.

### WATER AND WATER-COURSES.

See MUNICIPAL CORPORATIONS, 3.

### WILL.

1. *Construction—Devise—“Trustee of his Heirs” — Legal Estate for Life—Equitable Estate in Remainder—Rule in Shelley’s Case—Direction for Conversion of Estate—Bequest of Personality—Life Interest in Part of Estate.*—*Held*, by the majority of the Court, affirming the judgments of RIDDELL, J., and a Divisional Court, 24 O.L.R. 1, that the rule in Shelley’s case did not apply to the devise to the testator’s son H., and that H. took under the will a legal estate for his life and an equitable estate in remainder for those who should be his heirs at the time of his death. — *Per* MAGEE, J.A.:—If the devise were to be treated as a devise of realty, the limitations were such as to give the equitable fee simple to H., the legal estate being in the executors, if not outstanding in mortgagees; and, if the legal estate was not vested in the executors or mortgagees, H. would be entitled to the legal and equitable estate in fee simple. But, looking at all the provisions of the will, it appeared that the testator contemplated conversion of his estate; and, therefore, it should all be deemed personality. Treating the gift as a bequest of personality, it was not to be governed by the same rules as a devise of realty or one of mixed realty and personality; and the conclusion was the same as that of the majority of the Court, viz., that H. should be de-

clared entitled to a life interest only. *Re McAllister*, 17.

2. *Construction—Legacy—Annuity—Predecease of Legatee—Failure of Gift—Annuity during Lifetime of Widow—Death of Annuitant before Widow—Right of Personal Representatives—Specific Legacy—Vested Gift—Substitutionary Gift to Children of Legatee—Predecease of Legatee—“Children” of Legatees—Rights of Grandchildren.*—The testator by his will gave all his estate to his executors in trust: first, to convert all his real and personal property into money; second, out of the proceeds to pay certain legacies, among others, to pay to two named sisters each \$100 *per annum* during the lifetime of his wife; third, after payment of the legacies and debts, to invest the remainder of the estate and pay the interest and proceeds to his wife during her life; fourth, after the death of his wife, to pay to the two sisters before-mentioned each \$500, and to divide the remainder equally among all his brothers and sisters, including the two named, share and share alike. Then followed this clause: “Should any of my brothers or sisters die before the final division of my estate leaving lawful issue . . . the share to which such deceased brother or sister would have been entitled if living shall be divided equally amongst the children of such deceased brother or sister so that such child or children shall take the portion to which his her or their parent would have been entitled if living:”—*Held*, that the annuity and the gift of \$500 to one sister lapsed, she having died before the testator: sec. 37 of the Wills Act, 1 Geo. V. ch. 57,

applies only when the intended beneficiary is a “child or other issue of the testator.”—2. That, the other named sister having survived the testator but having died before the wife, her personal representatives were entitled to the \$100 a year given to her from her death till the death of the wife. — 3. That the legacy of \$500 to this sister vested at the death of the testator, and the \$500 was payable to her personal representatives, the wife having died.—4. That the children of the sister who died before the testator were not entitled to a share, under the clause above quoted. The gift to children of brothers and sisters is substitutionary, not substantive — the children are beneficiaries out of that which the parent would have received if living.—*Christopherson v. Naylor* (1816), 1 Mer. 320, and *Thornhill v. Thornhill* (1819), 4 Madd. 377, are still of authority.—5. That “children” in the clause quoted did not include grandchildren, and the children of deceased children of deceased brothers and sisters did not take in competition with surviving children of deceased brothers and sisters.—Review of the authorities. *Re Denton*, 505.

3. *Construction—Legacy of Specific Sum in Hands of Third Person—Debt Owing to Testatrix—Payment before Death—Lapse of Legacy—Petition for Advice of Court—Trustee Act, sec. 39 (1)—Scope of—Petition Changed into Originating Notice under Con. Rule 938 (a)—Practice.*—A testatrix bequeathed to C. R. the sum of \$500, “being the amount of money now in the hands of W. A. R. belonging to me and not secured by mortgage it being

my intention to devote that specific money to be paid by the said W. A. R. to the said C. R." At the time the will was made, W. A. R. owed the testatrix \$500 for money advanced by her to him, and this was not secured by mortgage. Afterwards she demanded payment of all the money owing to her by W. A. R., and the same was repaid to her. The moneys paid to her by W. A. R. were deposited in a bank, and between the date of the will and the date of her death—a period of about eighteen months—she had always on deposit in a bank at least \$600, and at the time of her death she had more than \$1,000:—*Held*, that, as the chose in action bequeathed to C. R. had been changed by the testatrix into a chose in possession, C. R. was not entitled to be paid \$500 out of her estate—the legacy lapsed. — *Frewen v. Frewen* (1875), L.R. 10 Ch. 610, applied and followed.—Section 39 (1) of the Trustee Act, R.S.O. 1897, ch. 129, does not give the Court power to determine the rights of the parties or any party under a will, upon petition. — *Re Hooper* (1861), 29 Beav. 656, and *In re Williams* (1868), 1 Ch. Ch. R. 372, followed.—The executor's petition for the advice of the Court, under sec. 39 (1), was, by consent, turned into a motion upon originating notice, under Con. Rule 938 (a). *Re Rally*, 112.

4. *Construction — Residuary Clause — Division of Residue among Children in Proportion to Legacies—Alterations in Amounts by Codicil—Second Codicil—Revocation of Legacy—Substituted Gift.*—*Held*, reversing the judgment of a Divisional Court, 24 O.L.R. 5, that, upon the true

construction of the provisions of the will there set out, the testator's sons H. A. H. and D. J. H. were entitled to share in the residue of the testator's estate in the proportion that the sum of \$7,000 bears to the total of the bequests of personal property; GARROW and MEREDITH, JJ.A., dissenting. *Re Hunter*, 400.

5. *Construction—Trust for Investment—Powers of Trustees—Nature of Investments—"Securities."—Company Shares—Debentures — Second Mortgages — Foreign Land—Purchase of Land—Direction to Carry on Testator's Business — Power to Expend Money on Building not Part of Business.*—The testator by his will gave all his estate to his executors and trustees, upon trust to invest, to collect the income and pay it as directed by the will. He empowered them to continue investments existing at the time of his death or to change them from time to time as they might think advisable, and to invest "in such reasonably safe income-producing securities as . . . they may approve without thereby rendering themselves . . . liable for any loss." The executors were directed, if they thought it advisable, to continue the testator's business until they should agree that it was advisable to sell it, and were given full discretion as to the time to sell. The widow was also given, during widowhood, the use of the house "and all the household furniture books and other contents of such residence at the time of my death except any money or securities for money there may be therein." At the date of the will and of the death, the testator had in his house certain scrip representing



shares of the stock of banks and other companies and \$3,000 in debentures. He had no other "securities" in his house:—*Held*, upon a summary application by the executors for an interpretation of the will, as to the powers of investment, that, although "securities," in its ordinary legal and primary meaning, does not include shares in a joint stock company, it is used colloquially and in business transactions in a sense wide enough to include such shares, and that was the sense in which this testator used the word; and, therefore, the executors had power to invest in shares and debentures similar to those which the testator held at the dates of his will and death.—*Held*, also, as to other proposed investments and expenditures, that a second mortgage is a security, no matter where the land may be, but land is not; that the direction to carry on the business did not justify spending the money of the estate upon a building which was not part of the business, nor is such a building a "security" such as the testator had at his house. *Re J. H.*, 132.

6. *Construction — Trust Fund for Benefit of Son—Sole Discretion of Trustee—Death of Beneficiary—Intestacy as to Portion of Fund not Disposed of—Date of Ascertainment of Next of Kin.*—The testator devised his real estate and bequeathed his chattels to his son; and, after payment of his debts and funeral expenses, gave the rest of his cash and securities in bank or in his possession in trust to his executor, "and I authorise and request him to pay the interest . . . and the principal in whole or in part to my son . . .

as in the judgment of my executor may be prudent with reference to the habits and conduct of my son my will and intention being that it shall be wholly in the discretion of my said executor to pay the interest and principal in such amounts and at such times as he may think right or to withhold the payment altogether." The executor received the bequest, and out of it paid certain sums to the son, who lived for fifteen years after the testator's death. At the death of the son a considerable sum remained, which was claimed by the executors of the son and by the next of kin of the father:—*Held*, that there was an intestacy as to this sum; and the next of kin, ascertained as at the date of the death of the father, were entitled.—Review of the authorities.—*Gude v. Worthington* (1849), 3 DeG. & Sm. 389, considered and distinguished.—Judgment of *Boyd, C.*, affirmed. *Re Rispin*, 633.

See COSTS, 2.

### WINDING-UP.

See COMPANY.

### WORDS.

"Binder."—See INSURANCE, 2.

"Caused by such Intoxication."]

—See INTOXICATING LIQUORS.

"Children."—See WILL, 2.

"Claim or Demand."— See SURROGATE COURTS.

"Construct."— See STREET RAILWAYS, 2.

"Detached House."— See VENDOR AND PURCHASER, 3.

"Gold Medal."—See TRADE MARK.

"Impairing."—See RAILWAY, 1.

"Mines of Minerals."— See DEED, 2.

*"Penalty."*—See MECHANICS' LIENS.

*"Residential Purposes."*]—See VENDOR AND PURCHASER, 3.

*"Riding as a Passenger."*—See INSURANCE, 1.

*"Securities."*—See WILL, 5.

*"Springs of Oil."*—See DEED, 2.

*"Suitable Pentice."*] — See MINES AND MINERALS, 1.

*"The Three Months Immediately Following the Recording."*—See MINES AND MINERALS, 2.

*"Trade."*—See VENDOR AND PURCHASER, 3.

*"Traffic."*—See RAILWAY, 1.

*"Trustee of his Heirs."*]—See WILL, 1.

*"Visible Means of Maintaining himself."*]—See CRIMINAL LAW, 3.

*"Welfare."*—See INFANT.

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## WORK AND LABOUR.

See MECHANICS' LIENS — MUNICIPAL CORPORATIONS, 2.







